Supreme Court, U.S.
FILED

No. 94-~~94~~ 532 SEP 20 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW WEIR SHIPPING LIMITED, formerly known as Bank Line Limited, SAFBANK LINE LIMITED, and SOUTH AFRICAN MARINE CORPORATION LIMITED,

Petitioners,

—v.—

JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS, SERGIO CASSAINE, JR., FRANK LONARDO, S.Y. KUO, Captain, THOMAS POPOLA, and JOHN W. MILLARD, as Trustees for and on behalf of the NYSA-ILA Pension Trust Fund,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WALTER H. LION
Counsel of Record
MADDY, DALTON & LION
405 Lexington Avenue
New York, New York 10174
(212) 983-2345

Attorneys for Petitioners Andrew Weir Shipping Limited, Safbank Line Limited, and South African Marine Corporation Limited

10 PP

QUESTIONS PRESENTED

1. Whether the word "employer" in ERISA Title IV is defined by the same rule the Court applied to define "employee" in *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), *i.e.*, the settled common law meaning of the word?

2. Whether formation of a joint venture is a corporate reorganization that is exempt from pension withdrawal liability under ERISA?

PARTIES

The names of all parties to the proceeding in the courts below appear in the caption of this petition. The parent of Petitioner South African Marine Corp. Ltd. is Safmarine & Rennies Holdings Ltd., a publicly traded South African corporation. The parent of Petitioner Andrew Weir Shipping Ltd. is Andrew Weir & Co., which is a British corporation, privately owned by the Weir family and charitable trusts. The only subsidiaries that are not wholly-owned are Safbank Line Ltd., Comeric Ltd., and Bank Line East Africa Ltd., which are subsidiaries within the Andrew Weir & Co. Group.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

A. Statement of Facts 7

B. Prior Proceedings and Basis for Federal Jurisdiction 8

REASONS FOR GRANTING THE WRIT 9

I. THE OPINION BELOW INTERPRETS THE WORD "EMPLOYER" IN ERISA TITLE IV IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS AND WITH OTHER ERISA TITLE IV PROVISIONS. 9

A. Established Court precedent requires that the word "employer" in ERISA Title IV be defined in accordance with its settled common law meaning. 9

B. The court's interpretation of the word "employer" conflicts with another ERISA Title IV provision. 14

II. THE ISSUE OF WHETHER A PENSION FUND WITHDRAWAL OCCURS WHEN TWO CONTRIBUTORS JOIN THEIR CONTRIBUTING BUSINESSES IN A JOINT VENTURE IS AN IMPORTANT AND NOVEL QUESTION OF FEDERAL LAW, WRONGLY DECIDED BELOW. 16

A. The opinion below was arbitrary and carpricious in finding that formation of Safbank was not an exempt corporate reorganization. 16

B. ERISA purposes and policies do not require a windfall to pension funds when contributors form joint ventures; Congress's denial of any exemption to evasion and avoidance transactions adequately protects beneficiaries. 18

CONCLUSION 19

APPENDIX A - Opinion of the United States Court of Appeals for the Second Circuit Dated June 22, 1994 . . . . . 1a

APPENDIX B - Amended Judgment of the United States District Court for the Southern District of New York Dated April 12, 1993 . . . . . 19a

Opinion of the United States District Court for the Southern District of New York Dated March 15, 1993 . . . . . 25a

Opinion of the United States District Court for the Southern District of New York Dated December 7, 1992 . . . . . 30a

APPENDIX C - American Arbitration Association Multiemployer Pension Plan Withdrawal Liability Arbitration Dated April 27, 1992 . . . . . 50a

TABLE OF AUTHORITIES

CASES

Andrew Weir Shipping Ltd. v. New York Shipping Ass'n - Int'l Longshoremen's Ass'n Pension Trust Fund, (Am. Arbitration Ass'n Case No. 13-621-00007-91, April 27, 1992) (not officially reported), aff'd sub nom. Bowers v. Andrew Weir Shipping, Ltd., 810 F.Supp. 522 (S.D.N.Y. 1992), modified, 817 F. Supp. 4 (S.D.N.Y. 1993), aff'd, 27 F.3d 800 (2d Cir. 1994) 2

Arnold Graphics Industries, Inc. v. Independent Agent Center, 775 F.2d 38 (2d Cir. 1985) 18

Bowers v. Andrew Weir Shipping, Ltd., 810 F.Supp. 522 (S.D.N.Y. 1992), modified, 817 F. Supp. 4 (S.D.N.Y. 1993), aff'd, 27 F.3d 800 (2d Cir. 1994) 2

Bowers v. Andrew Weir Shipping, Ltd., 27 F.3d 800 (2d Cir. 1994) 2

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 10

Connors v. P & M Coal Co., 801 F.2d 1373 (D.C. Cir. 1986) 12, 19

Copperweld Corp. v. Independence Tube Co., 467 U.S. 752 (1984) 17

Darden v. Nationwide Insurance Co., 796 F.2d 701 (4th Cir. 1986), reaff'd, 922 F.2d 203 (4th Cir. 1991), rev'd, 112 S.Ct. 1344 (1992) 13

Freytag v. Commissioner, 111 S. Ct. 2631 (1991) 15

Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund, 880 F.2d 1531, 1537 (2d Cir. 1989) 11-12

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1989) 12

Nationwide Mutual Insurance Co. v. Darden, 112 S.Ct. 1344 (1992) . . . . . i, 6, 10-13

Park South Hotel Corp. v. New York Trades Council and Hotel Association of New York City, Inc., Pension Fund, 851 F.2d 578 (2d Cir.), cert. denied, 488 U.S. 966 (1988) 18

R.E. Dietz v. United States, 939 F.2d 1 (2d Cir. 1991) . . . 14

Santa Fe Pacific Corp. v. Central States Pension Fund, Nos. 93-2736 and 93-2899 (7th Cir. June 10, 1994) (LEXIS, Genfed library, Currnt file) 19

Syenergy Methods, Inc. v. Kelly Energy Systems, Inc., 695 F. Supp. 1362 (D.R.I. 1988) 18

STATUTES

Employee Retirement Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1001 - 1461 (1988 and Supp. V 1993) . . . . . *passim*

29 U.S.C. § 1002(5) 11-12

29 U.S.C. § 1369(b) 2, 4-5, 16

29 U.S.C. § 1381(a) 2-3, 9

29 U.S.C. § 1392 . . . . . 2-4, 13-15, 18

29 U.S.C. § 1398(1) 2, 4, 16, 19

29 U.S.C. § 1399 7-8

29 U.S.C. § 1401 8

28 U.S.C. § 1254(1) 2

CONGRESSIONAL REPORTS

H.R. Rep. No. 869, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. Code Cong. & Admin. News, 2918 13

No. 94-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW WEIR SHIPPING LIMITED, formerly known as Bank Line Limited, SAFBANK LINE LIMITED, and SOUTH AFRICAN MARINE CORPORATION, LIMITED,

Petitioners,

v.

JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS, SERGIO CASSAINE, JR., FRANK LONARDO, S.Y. KUO, Captain, THOMAS POPOLA, and JOHN W. MILLARD, as Trustees for and on behalf of the NYSA-ILA Pension Trust Fund,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is officially reported as *Bowers v. Andrew Weir Shipping, Ltd.*, 27 F.3d 800 (2d Cir. 1994), and appears in Appendix A hereto at 1a. The opinions of the United States District Court for the Southern District of New York are officially reported as *Bowers v. Andrew Weir Shipping, Ltd.*, at 817 F. Supp. 4 (1993) and 810 F. Supp. 522 (1992), and are in Appendix B hereto at 25a and 30a respectively. An arbitrator's opinion, *Andrew Weir Shipping Ltd. v. New York Shipping Ass'n - Int'l Longshoremen's Ass'n Pension Trust Fund*, (Am. Arbitration Ass'n Case No. 13-621-00007-91, April 27, 1992) (not officially reported), appears in Appendix C hereto at 50a.

JURISDICTION

The Court of Appeals entered judgment on June 22, 1994. In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the judgment date. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This appeal arises under the Employee Retirement Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1001 - 1461 (1988 and Supp. V 1993) (hereinafter "ERISA" and "MPPAA" respectively) (the codification of the MPPAA provisions relevant hereto is referred to as "ERISA Title IV"). Relevant sections, 29 U.S.C. §§1381(a), 1392, 1398(1), and 1369(b), are as follows:

29 U.S.C. Section 1381(a) (1988). Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1392 (1988). Obligation to contribute

(a) "Obligation to contribute" defined

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising-

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. Section 1398(1) (Supp. V 1993). Withdrawal not to occur because of change in business form or suspension of contribution during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because -

(1) an employer ceases to exist by reason of -

(A) a change in corporate structure described in section 1369(b) of this title, or

(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan, or

* * *

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 USC § 1369(b) (1988). Treatment of transactions to evade liability; effect of corporate reorganization

(b) Effect of corporate reorganization.

For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

(1) Change of identity, form, etc.

If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.

(2) Liquidation into parent corporation.

If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.

(3) Merger, consolidation, or division.

If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

STATEMENT OF THE CASE

The most important issue raised by this case is whether ERISA Title IV provisions imposing a pension plan withdrawal liability on "employers" apply to companies that are not common law "employers" of the individuals covered by a pension plan. The court below decided this statutory issue in a way that conflicts with the clear and unambiguous rule followed by decisions of this Court, particularly *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344 (1992), which held that in the absence of a meaningful statutory definition, the Court must infer that Congress intended the word's established common law meaning to apply.

This is an issue of great practical significance to these Petitioners, which have been held liable for over $2,000,000 in pension withdrawal liability, and to other non-employers that are subject to an arbitrary and improper extension of withdrawal liability by the interpretation of the court below.

Even if Petitioners were "employers," a further important issue of federal law that this Court should settle is whether ERISA provisions exempting corporate reorganizations from withdrawal penalties apply to formation of a joint venture. The issue is significant because treating formation of joint ventures as pension withdrawals is arbitrary and capricious; the decision below gives a windfall to the pension fund, subjects covered operations to multiple withdrawal liability, and will discourage useful business ventures. It is grossly unfair that the ultimate owners suffer the loss from current payment of withdrawal liability although they still own the joint venture, which is still paying contributions and liable for further withdrawal liability if it ever ceases operations. Congress did not intend this result.

A. Statement of Facts

In 1988, two ship operators, the Bank Line Limited (hereinafter "Bank Line") and the South African Marine Corporation Limited (hereinafter "Safmarine"), formed a jointly-owned corporation, the Safbank Line Limited (hereinafter "Safbank"), in order to combine their cargo carrying operations between the United States and Africa into one joint venture. The main reason for forming the joint venture was that both companies were suffering financial difficulty in this business and could reduce expenses and be more efficient by operating jointly.

Bank Line and Safmarine each had contracts with stevedoring companies, which hired longshore workers belonging to the International Longshoremen's Association (hereinafter "ILA") to load and unload ships at the Port of New York and New Jersey. Both the shipowners and the stevedoring companies belonged to the New York Shipping Association (hereinafter "NYSA"), which collected assessments on the cargo loaded and unloaded in the Port, some of which went to fund a pension plan (hereinafter "NYSA-ILA Pension Trust Fund") benefitting ILA dock workers.

Safbank continued the operations of Bank Line and Safmarine's United States/Africa Liner Divisions, with about the same ships, equipment and personnel, and paying the same cargo assessments. On November 8, 1989, the Fund issued a notice claiming that Bank Line and Safmarine had ceased operations and demanding payment of withdrawal liability from Safmarine and Bank Line under 29 U.S.C. § 1399(b)(1) (1988), in the principal amounts of $1,404,752 and $252,181 respectively, with interest (for a total of $2,034,505) payable on a multi-year schedule (hereinafter "the Demand"). *See* App. B at 22a-24a.

B. Prior Proceedings and Basis for Federal Jurisdiction

When a pension fund issues a demand under ERISA, the recipient has ninety days to ask for reconsideration. 29 U.S.C. § 1399(b)(2) (1988). Also, a party may begin arbitration under 29 U.S.C. § 1401(a)(1) (1988) within sixty days after the earlier of: (a) the date the fund responds to a review request; or (b) 120 days after the date of the request.

Andrew Weir Shipping Limited (Bank Line's corporate successor) (hereinafter "Weir Shipping") and Safmarine asked the Fund to review the Demand on February 5, 1990, within the ninety day period. When the Fund did not reply within 120 days, they served a Notice of Arbitration to the Fund on July 16, 1990, within the sixty day period. Safbank joined in the Notice of Arbitration, as its Fund obligations depend on if it is Weir Shipping and Safmarine's successor. On April 27, 1992, an arbitrator issued an award (hereinafter "the Award"), declaring the Demand correct. App. C at 50a.

Under 29 U.S.C. § 1401(b)(2) (1988) a party may sue to enforce, vacate, or modify an arbitration award within thirty days after its issuance. In the district court, 29 U.S.C. § 1401(c) (1988) gives a rebuttable presumption that arbitral fact findings are right, while the District Court decides legal issues *de novo*.

The Fund sued in the United States District Court for the Southern District of New York to confirm the Award on May 21, 1992; Weir Shipping, Safmarine, and Safbank sued to vacate it and for a refund of payments on May 26, 1992. By stipulation, the parties consolidated the cases before the Hon. Peter K. Leisure.

On April 13, 1993, the District Court entered an Amended Judgment: (1) confirming the Award; (2) dismissing the action to vacate the Award and for a refund; and (3) declaring that Safmarine and Weir Shipping owed the principal amounts of $1,404,752 and $252,181 respectively, which they should keep paying, with interest, as scheduled. App. B at 19a.

On June 22, 1994, the United States Court of Appeals for the Second Circuit affirmed the Amended Judgment. App. A at 1a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW INTERPRETS THE WORD "EMPLOYER" IN ERISA TITLE IV IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS AND WITH OTHER ERISA TITLE IV PROVISIONS.

A. Established Court precedent requires that the word "employer" in ERISA Title IV be defined in accordance with its settled common law meaning.

The crux of the dispute is whether Weir Shipping and Safmarine were employers under ERISA Title IV (the MPPAA). An "employer" is subject to a withdrawal liability if it ceases covered operations and ceases contributions to a multiemployer pension fund. 29 U.S.C. § 1381(a) (1988). Weir Shipping and Safmarine, as carrier members of the NYSA, contributed to the NYSA/ILA Pension Trust Fund. However, the ILA workers covered by the Fund were employed, in the common law meaning of the term, by stevedoring companies that paid the workers and directed their activities in loading and unloading ships. The court below nevertheless held that, under the

MPPAA, Weir Shipping and Safmarine were the employers of the longshore workers and thus subject to withdrawal penalties.

The opinion below creates a logical conflict. While it held Weir Shipping and Safmarine to be "employers" under ERISA Title IV, this Court has held that the term "employee" for ERISA purposes means an employee at common law. Thus, the decision below results in Weir Shipping and Safmarine being "employers" of workers that are not their "employees" under the same law.

This conflict arises from *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), where a unanimous Court held that when ERISA's "employee" definition was circular, a court must infer that Congress meant to use the term in its common law agency sense. The Court quoted *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989):

> [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. . . . In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

112 S. Ct at 1348. Thus, an independent insurance agent in *Darden* was not an employee protected by ERISA. If *Darden*'s rule also applies to the "employer" definition, then the definition

used by the court below is not the definition that Congress intended for the MPPAA.

The court below noted that application of a common law rule, as in *Darden*, would reach a different result (App. A at 7a), but reasoned that the purposes and policies of ERISA require application of its own earlier opinion (also written by Circuit Judge Cardamone) in *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531, 1537 (2d Cir. 1989) (holding that for withdrawal liability purposes, an employer is "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants") (quoting district court) (hereinafter "contributing obligor" definition). *Korea Shipping* affirmed district court holdings where, "[a]greeing with the carriers' contentions that they were not the common law employers of the dock workers, the district court in each case nonetheless found that the issue was not governed by the common law definition." 880 F.2d at 1535.

The court below allowed, as noted in *Korea Shipping*, that ERISA Title IV had no meaningful definition of the word "employer." App. A at 8a. It nonetheless found support for its interpretation in a definition in ERISA Title I, 29 U.S.C. § 1002(5) (1988) ("The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer").

However, the § 1002(5) employer definition does not govern ERISA Title IV: "[T]he Supreme Court cautions that though the definitions in Title I 'may otherwise reflect the meaning of the term defined as used in other Titles,' . . . they

'do not apply elsewhere in the Act of their own force . . . ' " and "the MPPAA itself contains no definition of the word employer." 880 F.2d at 1536. *Accord, Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 370 (1980) ("definitions in [Title I, § 3] are not necessarily applicable to Title IV, because they are limited by the introductory phrase, 'For purposes of this title.' "); *Connors v. P & M Coal Co.*, 801 F.2d 1373, 1376-77 (D.C. Cir. 1986) ("we require more than an expansive interpretation of a definition in Title I to persuade us that Congress intended the word 'employer' in Title IV to encompass owner-officers acting within the legitimate scope of their corporate responsibilities").

It was precisely because the MPPAA had no employer definition that the court below in *Korea Shipping* decided it must create one. "We conclude that the definition of who is an employer for purposes of determining withdrawal liability under the MPPAA is one that in the final analysis must be left to the courts." 880 F.2d at 1536. Reliance on § 1002(5) was not justified. Neither the MPPAA nor its legislative history indicate that Congress intended §1002(5) to apply to ERISA Title IV.

The main reason given by the court to disregard *Darden* is that "a common law definition of employer would eliminate withdrawal liability for such a significant number of contributors as to threaten those plans' financial viability . . ." App. A at 8a (*quoting* 880 F.2d at 1537). The court's assertion of fact is speculative. No empirical support is in the record of this case, nor is any evidence cited in *Korea Shipping*. It is impossible to know what pension plans the court believes will be financially unviable, and why common law employers would be unable to meet their withdrawal liability in those plans.

There is much reason to question the court's speculation. First, adoption of the common law definition would have no impact on any contributing obligor's duty to fund contributions. Rather, the impact of applying a common law definition of employer in this case is to put the duty to pay withdrawal liability upon the stevedoring firms that are common law employers of longshore workers, instead of the steamship companies that have agreed to pay cargo assessments directly to the NYSA on the stevedoring firms' behalf. There is no reason to believe the common law employers could not meet this obligation.

Second, the speculation as to consequences to other plans overlooks what the law actually says. The MPPAA legislative history shows no intent to shift withdrawal liability from direct employers such as the stevedores to third parties such as the shipowners. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News, 2918. Indeed, 29 U.S.C. § 1392(a), as discussed below, says that an obligation to contribute is not an obligation to pay withdrawal liability. If a shift of the obligation from common law employers to contributing obligors is needed, then it is up to Congress to amend the law.

Darden reversed a Fourth Circuit employee definition that also was based on ERISA's policies and purposes. *See Darden v. Nationwide Insurance Co.*, 796 F.2d 701, 706-07 (4th Cir. 1986), *reaff'd*, 922 F.2d 203, 205-07 (4th Cir. 1991), *rev'd*, 112 S.Ct. 1344 (1992). The appeals court reasoning in *Darden* and the decision below is the same. Reliance on public policy to broaden ERISA provisions and override common law rules is an approach that should be rejected when Congress has not expressed an intent to override the established common law rules.

B. The court's interpretation of the word "employer" conflicts with another ERISA Title IV provision.

Another reason to review and reverse the holding of the court below is that the "contributing obligor" definition applied to the word "employer" conflicts with another ERISA Title IV provision. "[C]ourts are required to give effect to every clause and word of a statute if possible." *R.E. Dietz v. United States*, 939 F.2d 1, 5 (2d Cir. 1991). The contributing obligor definition makes 29 U.S.C. § 1392(a)(1988) meaningless. Under § 1392(a), an obligation to contribute does not include an obligation to pay withdrawal liability:

> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising -
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, *but*
>
> *does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.*

(emphasis supplied). If, as in the decision below, all contributing obligors are by definition employers, an obligation to contribute is always a duty to pay withdrawal liability. Unless the Court assumes that Congress enacted § 1392(a) in error, the court below's contributing obligor "employer" definition cannot be

correct. Although § 1392(a) was called to the court of appeals' attention, it did not discuss the issue in its opinion.

There is no basis to assume that Congress enacted § 1392(a) by mistake. Rather, § 1392(a) reasonably encourages third parties to agree to contribute on employers' behalf. Third parties are less likely to agree to contribute on an employer's behalf if doing so makes them liable for a withdrawal penalty, as in this case. Absent Congress's contrary order, the Court should interpret "employer" consistently with § 1392(a). *Freytag v. Commissioner*, 111 S. Ct. 2631, 2638 (1991) ("Our cases consistently expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.' ")

If read consistently with § 1392(a), it is clear that the contributing obligor "employer" definition is flawed, and that the common law definition is what Congress intended to apply to determine if withdrawal liability applied to a contributor. As Bank Line and Safmarine were not dock labor "employers," they were not liable for a withdrawal penalty.

II. THE ISSUE OF WHETHER A PENSION FUND WITHDRAWAL OCCURS WHEN TWO CONTRIBUTORS JOIN THEIR CONTRIBUTING BUSINESSES IN A JOINT VENTURE IS AN IMPORTANT AND NOVEL QUESTION OF FEDERAL LAW, WRONGLY DECIDED BELOW.

A. The opinion below was arbitrary and capricious in finding that formation of Safbank was not an exempt corporate reorganization.

Even if Safmarine and Bank Line were ILA-labor employers, a pension fund withdrawal does not occur under 29 U.S.C. § 1398(1) if: (1) an "employer;" (2) "ceases to exist;" (3) "by reason of a change in corporate structure described in §1369(b);" (4) that "causes no interruption in employer contributions or obligations to contribute under the plan." All of the tribunals below found the crucial issue to be the third element, whether this was a reorganization type described by § 1369(b) (leaving undisturbed the arbitrator's finding that none of the other elements disqualified the transaction). App. A at 12a, App. B at 37a-38a, and App. C at 70a - 71a. The changes described in § 1369(b) include a "change in . . . form . . . however effected" or "a merger, consolidation, or division . . ."

ERISA does not define "division," "merger," "consolidation," or "change of form." Thus, to determine if formation of a joint venture was encompassed within the exemption, the court below had to define these terms.

Finding that "division" had no established meaning, the Court of Appeals adopted the District Court's definition: "the term division, as used in the MPPAA, appears to connote a transaction whereby the stock of a contributing corporation is

'divided' away from its controlled group and acquired by or distributed to new owners." App. A at 12a and App. B at 42a. This definition requires a transfer of corporate stock, and thus excludes transactions such as this where a corporation separates or "divides" itself in two.

The court's definitional requirement of a stock transfer is nowhere stated in the statute or legislative history. Nor does the court state a policy reason why transactions involving separation of a corporate subsidiary from a corporate group should be favored over transactions involving separation of a unincorporated division from a corporate group. Indeed, in the context of antitrust law, this Court has cautioned that the courts should treat unincorporated divisions and subsidiaries the same, absent policy reasons to treat them differently. *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 772-73 (1984). Here, as in *Copperweld*, there is no good reason to treat subsidiaries and unincorporated divisions differently.

The court below suggested that Safbank's argument confused two different meanings of the word "division." App. A at 13a. However, the point of the argument is that the statute's use of the word "division" is broad enough to include separation from a parent corporation of either a subsidiary or an unincorporated entity such as a corporate division. Separations of the Safmarine and Bank Line divisions serving the United States and Africa from Safmarine and Bank Line were "divisions" of those companies into two distinct entities.

The court below further rejected the argument that the Liner Divisions were combined into Safbank by merger. App. A at 14a - 15a. While it is uncontested that no statutory merger occurred, the court disregarded authority that transactions such as

this may amount to *de facto* mergers. *See Syenergy Methods, Inc. v. Kelly Energy Systems, Inc.*, 695 F. Supp. 1362, 1365 (D.R.I. 1988) (sale of a corporate division where seller corporation survived held to be a *de facto* merger); *See also Arnold Graphics Industries, Inc. v. Independent Agent Center*, 775 F.2d 38, 42 (2d Cir. 1985). The ERISA merger exemption is not, by its terms, limited to statutory mergers, and should include *de facto* mergers, as justice requires.

A further exemption from withdrawal liability arises when a corporate reorganization amounts to a change of form. The court refused this exemption although its own precedents have afforded this exemption in cases involving greater real change in ultimate ownership than in Safbank's case. *See Park South Hotel Corp. v. New York Trades Council and Hotel Association of New York City, Inc., Pension Fund*, 851 F.2d 578, 582-84 (2d Cir.), *cert. denied*, 488 U.S. 966 (1988) (sale of a partnership and replacement of all of the former partners with new ones held not to cause withdrawal of former partners). As in *Park South* a broad reading of the exemption is needed to achieve Congress's intent of avoiding undue burdens on corporate reorganizations.

B. ERISA purposes and policies do not require a windfall to pension funds when contributors form joint ventures; Congress's denial of any exemption to evasion and avoidance transactions protects beneficiaries.

The court below justified its narrow statutory construction of ERISA exemptions on ERISA's remedial purpose. But, Congress gave pension funds other means of protection from any abuse of the exemptions. Under 29 U.S.C. § 1392(c) a fund disregards evasion or avoidance transactions and collects

withdrawal penalties even if a deal is otherwise exempt. *Santa Fe Pacific Corp. v. Central States Pension Fund*, Nos. 93-2736 and 93-2899 (7th Cir. June 10, 1994) (LEXIS, Genfed library, Currnt file); *Connors v. P & M Coal Co.*, 801 F.2d 1373, 1378 (D.C. Cir. 1986). Safbank's formation was for real business purposes, and caused the Fund no loss. Congress enacted § 1398(1) to balance the policy of protecting pension funds with the competing policy of letting businesses organize efficiently; imposing a burdensome penalty on a joint venture that caused the Fund no loss is against Congress's intent.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and order of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
September 19, 1994

Respectfully submitted,

Walter H. Lion
Counsel of Record
MADDY, DALTON & LION
405 Lexington Avenue, 51st Fl.
New York, NY 10174-0083
(212) 983-2345
Attorneys for Petitioners Andrew Weir Shipping Limited., South African Marine Corporation Limited., and Safbank Line Limited

APPENDIX

Appendix A

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 22, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 399 - August Term, 1993

(Argued September 29, 1993 Decided June 22, 1994)

Docket No. 93-7014

JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS, SERGIO CASSAINE, JR., FRANK LONARDO, S.Y. KUO, Captain, THOMAS POPOLA, JOHN W. MILLARD, as Trustees for and on the behalf of the NYSA-ILA Pension Trust Fund,

Plaintiffs-Appellees,

—v.—

ANDREW WEIR SHIPPING, LIMITED, formerly known as Bank Line Ltd., SAFBANK LINE LIMITED, SOUTH AFRICAN MARINE CORP., LTD.,

Defendants-Appellants,

ANDREW WEIR SHIPPING LIMITED, formerly known as Bank Line Limited, SOUTH AFRICAN MARINE CORP.,

Appendix A

LTD., SAFBANK LINE LIMITED, as successor in interest,

Plaintiffs-Appellants,

—v.—

NEW YORK SHIPPING ASSOCIATION-INTERNATIONAL LONGSHOREMAN'S ASSOCIATION PENSION TRUST FUND, BOARD OF TRUSTEES OF THE NYSA-ILA PENSION TRUST FUND,

Defendants-Appellees.

Before:

CARDAMONE, McLAUGHLIN and LAY, *

Circuit Judges.

Appellants, Andrew Weir Shipping Ltd., *et al.*, appeal from a final judgment entered on April 13, 1993, by the United States District Court for the Southern District of New York (Leisure, J.), confirming an arbitration award in favor of appellees, John Bowers, *et anos* as trustees for the NYSA-ILA Pension Trust Fund, and dismissing appellants' action to vacate the award and denying its motion for summary judgment.

Affirmed.

---

* Hon. Donald P. Lay, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

WALTER H. LION, New York, New York (Maddy, Dalton & Lion, New York, New York, of counsel), *for Appellants*.

MAURA R. CAHILL, New York, New York (Gleason & Mathews, New York, New York, of counsel), *for Appellees*.

CARDAMONE, *Circuit Judge*:

Two shipping companies appeal from a final judgment entered on April 13, 1993 by the United States District Court for the Southern District of New York (Leisure, J.), that confirmed an arbitration award imposing withdrawal liability on them and in favor of a longshoreman's pension trust fund. The judgment appealed from dismissed appellants' action to vacate the award and its motion for summary judgment. We affirm.

BACKGROUND

The Parties

This dispute involves the intertwining of two businesses, each of which has its own complex organizational scheme. One entity is a British company named Bank Line Limited (Bank Line), a wholly-owned subsidiary of Andrew Weir & Co., Ltd. (Andrew Weir Group), which is privately owned by the Weir family and several charitable trusts. In 1980 one of Bank Line's divisions began operating a cargo service between the United States, including the Port of New York, and South Africa. Subsequent to the events at issue, Bank Line was consolidated with other

subsidiaries of the Andrew Weir Group into a new company called Andrew Weir Shipping Limited (Weir Shipping). Although Weir Shipping, as Bank Line's corporate successor, is the party in this action presently representing the interests of the Andrew Weir Group, for purposes of clarity we refer to the entity as Bank Line.

The other entity, South Africa Marine Corp., Ltd. (Safmarine), a South African wholly-owned corporate subsidiary of Safmarine and Rennies Holding Limited (Safren Group), had a division similarly engaged in cargo trade between the United States and South Africa. The Safren Group is a highly-diversified, publicly-traded South African corporation.

Neither Bank Line nor Safmarine had marine terminal facilities in the Port of New York; both contracted for these services. During the period they operated out of the Port of New York, the two respective divisions of these large companies, that is Bank Line and Safmarine, were members of the New York Shipping Association (NYSA or Shipping Association), an organization of ship operators, agents, stevedores and other shipping-related businesses. As members of the Shipping Association, Bank Line and Safmarine were bound by its bargaining agreement with the International Longshoreman's Association (ILA), the collective bargaining representative for the Port of New York's longshoremen.

Pursuant to the labor contract, steamship carriers pay to the Shipping Association assessments for its employees' benefits based on total tonnage loaded and unloaded from the carriers' vessels by longshoremen in the Port of New York. The Shipping Association remits a portion of the assessments it receives from its members to the NYSA-ILA Pension Trust Fund (Fund), which is managed by a board of trustees appointed by the ILA and the NYSA. *See generally Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*,

Appendix A

880 F.2d 1531, 1533-35 (2d Cir. 1989) (explaining the foregoing in greater detail). Bank Line and Safmarine regularly paid assessments through the Shipping Association to the Fund into the year 1988.

Meanwhile, political pressure had been mounting during the mid-1980s for American business to cease commercial trading with the then apartheid-sponsoring government of South Africa, resulting in a precipitous drop in American trade with that nation. The economic fallout from the trade embargo had adverse economic consequences on Bank Line and Safmarine, leading to their signing of a "space charter and sailing" agreement in 1985 for the routes both businesses serviced between the U.S. and South Africa. Under that agreement the companies jointly scheduled their ships in a convenient manner, each carrying cargo for the other, which effectively reduced the number of vessels each had to operate to South Africa while at the same time offering cargo shippers more frequent sailings.

Prompted by the success of their contractual relationship, Safmarine and Bank Line entered into a joint venture on November 30, 1987 establishing Safbank Line Limited (Safbank), a separate British company, to operate ships between South Africa and the United States. Under the agreement Bank Line and Safmarine withdrew from the shipping trade, which was now to be served by Safbank. Bank Line and Safmarine continued their separate shipping operations on routes other than those between the U.S. and South Africa.

Safbank is 45 percent owned by Safmarine and 55 percent owned by Comeric Limited, a corporation 63 percent of whose stock is owned by Bank Line and 37 percent of which is indirectly owned by Safmarine. As a result of this somewhat complex corporate structure, the Andrew Weir Group has voting control of

Safbank, while profits are distributed 65 percent to the Safren Group and 35 percent to the Andrew Weir Group. Each of those parent companies nominates three directors to Safbank's Board of Directors. Safbank assumed the goodwill, reputations, and customer relations of Bank Line's and Safmarine's United States-South Africa operations, and became bound by the collective bargaining agreement between the Shipping Association and the ILA by retaining an NYSA member as its general agent.

The Dispute

The genesis of the dispute that is before us on appeal arises from letters from the Fund dated November 8, 1989 directed to Bank Line and Safmarine advising that it had received notice of their cessation of shipping operations. It gave the two companies notice that it had thereupon calculated their respective withdrawal liability at $1,404,752 for Safmarine and $252,181 for Bank Line, under the terms of the Employee Retirement Income Security Act of 1974 (ERISA) as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992). The MPPAA requires an employer that withdraws from a multiemployer pension plan to pay its proportionate share of the plan's unfunded vested employee benefits, the so-called withdrawal liability. *See* 29 U.S.C. §§ 1381 (1988), 1391 (1988 & Supp. IV 1992).

Following Bank Line and Safmarine's joint request for reconsideration, the Fund reaffirmed its determination imposing withdrawal liability on them. Bank Line and Safmarine timely commenced arbitration, as required by 29 U.S.C. § 1401 (1988), which Safbank joined because its contribution history depends on whether it is a successor to Bank Line and Safmarine.

Appendix A

On April 27, 1992 the arbitrator sustained the Fund's determination. The following month the parties brought separate actions that were consolidated in the district court. Shortly thereafter, in June 1992, the Fund moved to confirm and enforce the arbitration award; Bank Line, Safmarine, and Safbank cross-moved to vacate the award, and for summary judgment on their claim that Bank Line and Safmarine were not subject to MPPAA's withdrawal liability provisions. Judge Leisure, in an order and thorough opinion dated December 7, 1992, confirmed the arbitration award and denied the cross-motion to vacate and for summary judgment. *See* 810 F. Supp. 522 (S.D.N.Y. 1992). On March 15, 1993 the district judge issued an order and opinion amending the judgment to provide that Bank Line's and Safmarine's withdrawal liabilities are payable in accordance with the Fund's established schedules. *See* 817 F. Supp. 4 (S.D.N.Y. 1993). This appeal followed.

DISCUSSION

I. VITALITY OF *KOREA SHIPPING*

As an initial matter, appellants maintain that the Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), undermines our holding in *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989), which ruled that steamship vessel carriers who contribute to the NYSA-ILA pension fund are "employers" for purposes of MPPAA withdrawal liability. Under 29 U.S.C. § 1381(a), withdrawal liability is only assessed against employers. Thus, if appellants are correct in their assertion, there can be no statutory basis for assessing them withdrawal liability.

In *Korea Shipping* we defined the term "employer" in § 1381(a) as " 'a person who is obligated to contribute to a plan

either as a direct employer or in the interest of an employer of the plan's participants.' " *See* 880 F.2d at 1537 (quoting district court opinion in the same case, 663 F. Supp. 766, 770 (S.D.N.Y. 1987)). *Korea Shipping* went on to find that steamship carriers, situated similarly to appellants in this case, came within this definition. *See* 880 F.2d at 1539-40; *see also Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39, 41 (2d Cir.) (per curiam) (same), *cert. denied*, 498 U.S. 983 (1990); *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 261-62 (2d Cir. 1990) (same).

In particular, after considering the purposes and policies underlying the MPPAA, *Korea Shipping* held that the common law definition of employer was too restrictive to accomplish the purposes of the MPPAA. *See* 880 F.2d at 1537.

> [To] adopt the meaning of the word employer appellants urge would open a gaping hole in many multiemployer plans. Such a common law definition of employer would eliminate withdrawal liability for such a significant number of contributors as to threaten those plans' financial viability and potentially make them victims of the precise threat Congress aimed to shield them from when it enacted the MPPAA.

Id. Accordingly, the panel looked to the definition in Title I of ERISA, which was not applicable of its own force, but that was "fully consonant with the MPPAA's objectives." *Id.* Further, in the wake of *Korea Shipping*, three of our sister circuits have adopted the contributing obligor definition, specifically following the analysis it postulated. *See Imel v. Laborers Pension Trust Fund For N. Cal.*, 904 F.2d 1327, 1331 (9th Cir.), *cert. denied*, 498 U.S. 939 (1990); *Carriers Container Council, Inc. v. Mobile S.S. Ass'n, Inc.-ILA Pension Plan & Trust*, 896 F.2d 1330, 1343-44 (11th

Cir.), *cert. denied*, 498 U.S. 926 (1990); *Seaway Port Auth. v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan*, 920 F.2d 503, 507 (8th Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991).

In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court in 1992 adopted for ERISA purposes the common law meaning for the term "employee" because the statutory definition of the word employee was completely circular. *See* 112 S. Ct. at 1348. *Darden* on its face dealt of course with the definition of "employee," not "employer," the term defined in *Korea Shipping*. More importantly, the Supreme Court noted that borrowing the common law view of the term "employee" was dictated by the lack of any clear legislative definition to the contrary. *See id.* Similarly, as Justice Souter, writing for a unanimous Court, noted, the adoption of the common law definition of employee would not "thwart the congressional design or lead to absurd results." *Id.* We reached the opposite conclusion as described above with respect to the term "employer" in *Korea Shipping*. *See* 880 F.2d at 1537. We see no principled reason why *Korea Shipping* should be disturbed in light of *Darden* so as to require us to apply to the term "employer," its common law meaning — one that obviously would not include appellants. Hence, we reaffirm *Korea Shipping*'s holding.

II. WITHDRAWAL LIABILITY

The more difficult question to be resolved is whether the formation of Safbank, and the transfer to it of the unincorporated liner operations of Safmarine and Bank Line, constitutes the sort of corporate change contemplated by 29 U.S.C. §§ 1398(1) (Supp. IV 1992) and 1369(b) (1988), which would afford Safmarine and Bank Line an exemption from MPPAA withdrawal liability.

Appendix A

At the outset, we address the standard of review. The district court believed the decisions of an arbitrator on matters of law in an MPPAA withdrawal dispute are reviewed *de novo*. *See* 810 F. Supp. at 526. We assume this to be the appropriate standard, as do all the other circuits that have considered the issue. *See Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 999 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3378 (U.S. Nov. 12, 1993); *Crown Cork & Seal Co. v. Central States S.E. & S.W. Areas Pension Fund*, 982 F.2d 857, 860 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2961 (1993); *CMSH Co. v. Carpenters Trust Fund for N. Cal.*, 963 F.2d 238, 240 (9th Cir.), *cert. denied*, 113 S. Ct. 185 (1992); *Trustees of Colo. Pipe Indus. Pension Trust v. Howard Elec. & Mechanical Inc.*, 909 F.2d 1379, 1386 (10th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991); *Union Asphalts & Roadoils, Inc. v. MO-KAN Teamsters Pension Fund*, 857 F.2d 1230, 1233 (8th Cir. 1988), *cert. denied*, 490 U.S. 1022 (1989); *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984); *Republic Indus., Inc. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Since the parties have not controverted this standard of review in the MPPAA context, and because its resolution is not here critical, we do not presently rule that *de novo* review is the correct standard in withdrawal dispute litigation under MPPAA.

Passing now to an analysis of the corporate changes, it must be observed that in designing a comprehensive scheme to regulate employer plans and to exercise control over the withdrawal of their contributing members, Congress did not include exemption from withdrawal liability for joint ventures. Section 1398 of the MPPAA provides an exemption from withdrawal liability only under certain circumstances:

Appendix A

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because —
>
> (1) an employer ceases to exist by reason of —
>
> (A) a change in corporate structure described in [29 U.S.C. § 1369(b)] . . . .

29 U.S.C. § 1398(1)(A). As § 1398 makes clear, an employer wishing to avoid withdrawal liability must come within one of the exceptions set forth in § 1369(b), which reads in relevant part as follows:

> (1) Change of identity, form, etc.
>
> If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.
>
> . . . .
>
> (3) Merger, consolidation, or division
>
> If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

29 U.S.C. § 1369(b).

Appendix A

The arbitrator and the district court both concluded that none of the categories of corporate change set forth in the MPPAA granting a withdrawal liability exemption apply to the transfer of Safmarine's and Bank Line's operations to Safbank. *See* 810 F. Supp. at 526-29.

Bank Line and Safmarine challenge this conclusion, insisting the joint venture formation of Safbank was a division, a merger, a consolidation, or a mere change of form. Because none of these terms are defined in either ERISA or the MPPAA, it is our task to ascertain what Congress meant by them and determine whether appellants' corporate changes fit within such definition. Thus, for purposes of this appeal, the primary substantive issue to be determined is whether the formation of Safbank is encompassed by § 1369(b).

A. *Division*

While "division" is not a term of art with a widely established meaning, the district court -- relying on the scant legislative history and an opinion letter of the Pension Benefit Guaranty Corporation -- concluded that the term, "as used in the MPPAA, appears to connote a transaction whereby the stock of a contributing corporation is 'divided' away from its controlled group and acquired by or distributed to new owners." 810 F. Supp. at 528. We agree with this analysis of the term "division" and adopt it. *See Teamsters Pension Trust Fund v. Central Mich. Trucking, Inc.*, 857 F.2d 1107, 1108 (6th Cir. 1988) (finding such a "spin-off" transaction to be a change in corporate structure exempt from withdrawal liability); *cf. Redding v. Commissioner*, 630 F.2d 1169, 1173 (7th Cir. 1980) (finding such a transaction to meet the requirements for a tax-exempt corporate division), *cert. denied*, 450 U.S. 913 (1981).

Appendix A

In the instant case, the formation of Safbank obviously is not a division under our adopted definition of that term. Bank Line's and Safmarine's unincorporated divisions were transferred to an entirely new entity, Safbank. No stock changed hands in the transaction. Appellants' attempt to hitch their wagon to this provision — merely because the entities they transferred to Safbank were called "divisions" — is a semantical subterfuge to which a court should not accord legal consequence. Further, we note that Congress' inclusion of "division" in § 1369(b)(3) along with the recognized terms "merger" and "consolidation" suggests its aim that "division" connote some form of business transformation, one not accomplished simply by naming a business operating unit a "division."

In anticipation of the foregoing analysis, appellants declare that requiring a stock transfer exalts form over substance. To the contrary, it is our responsibility to make sure the legislative tests for permitting the avoidance of withdrawal have been satisfied, not to determine whether extraneous considerations could lead to a different conclusion. *See Brentwood Fin. Corp. v. Western Conference of Teamsters Pension Trust Fund*, 902 F.2d 1456, 1461 (9th Cir. 1990); *see also Central States, S.E. & S.W. Areas Pension Fund v. Bellmont Trucking Co.*, 788 F.2d 428, 433 (7th Cir. 1986) ("[W]e are bound by the particular rules enacted by Congress [in the MPPAA] and are not free to carve out our own exceptions merely because we believe they would not undermine Congress' goals."); *New York State Teamsters Conference Pension & Retirement Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003, 1009 (N.D.N.Y. 1985) ("In light of the policy behind ERISA, as amended by the MPPAA, exemptions to a withdrawing employer's liability should be narrowly construed."). In the absence of any clear indication that the meaning of the term "division" in the statute could encompass the formation of Safbank,

appellants are not entitled to an exemption from withdrawal liability under this provision.

B. *Merger or Consolidation*

The terms "merger" and "consolidation" also do not neatly fit this joint venture. These terms have black-letter law definitions. "A merger of two corporations contemplates that one corporation will be absorbed by the other and will cease to exist while the absorbing corporation remains." *Engel v. Teleprompter Corp.*, 703 F.2d 127, 131 (5th Cir. 1983); *see also Black's Law Dictionary* 988 (6th ed. 1990) (defining merger as "[a]n amalgamation of two corporations pursuant to statutory provision in which one of the corporations survives and the other disappears."). A consolidation is the combination of two or more corporations into a newly created entity. *See Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir. 1977); *see also Black's Law Dictionary* 309 (6th ed. 1990) (same).

In the instant case, both Safmarine and Bank Line continue to exist in exactly the same corporate form as they did prior to the formation of Safbank. No corporation or parent went out of business, and there was no change in corporate structures of the principals or parent corporations. Rather, the sole event of any legal consequence was the creation by the two corporations of Safbank as an entirely new third entity.

Appellants' contention that we should consider the creation of Safbank as a *de facto* merger is unpersuasive. It is quite clear that a *de facto* merger is no different conceptually from an ordinary merger, except for the fact that there has not been "compliance with the statutory requirements for a merger." *Arnold Graphics Indus., Inc. v. Independent Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985); *see also In re Augie/Restivo Baking Co.*, 860

F.2d 515, 519-20 (2d Cir. 1988) (setting forth the requirements for the finding of a *de facto* merger). In the case at hand, as just described, the conceptual requirements of an ordinary merger were not met; *a fortiori*, there can be no *de facto* merger.

C. *Change in Form*

Appellants also declare that Safmarine and Bank Line ceased to exist as employers merely by reason of a change in form or structure, even though the change was one not explicitly recognized by the statute. They rely on our holding in *Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578 (2d Cir.), *cert. denied*, 488 U.S. 966 (1988), for the proposition that under the change in corporate structure provision the court should take a "common sense" approach to corporate reorganizations.

In *Park South Hotel*, we held that a sale of a partnership to entirely new partners did not warrant withdrawal liability. The decision hinged on the continuation of the partnership itself: "At all pertinent times, both before and after the sale, it was the partnership . . . that was the 'employer.' Before the sale it was the partnership that made the payments to the Fund, and the partnership continued to make those payments after the sale." *Id.* at 582. As the panel noted, "Congress did not intend to treat, as an employer withdrawal from a plan, mere changes in the form or structure of an employer that do not alter *the employer's* basic relation with, participation in, or obligation to, the plan or change the nature of *the employer's* operations." *Id.* at 583-84 (emphasis added).

None of these indicia are present in this case. Safmarine and Bank Line have been completely supplanted by Safbank. And, although they remain viable entities themselves, they maintain no relationship with the Fund, the ILA or the stevedores.

Notwithstanding these facts, appellants direct us to a clause in the agreement establishing Safbank under which that company purports to assume the pension liability of Bank Line and Safmarine. This clause offers little solace to the Fund. Safbank has no fixed assets of its own to secure any future liability, as the director of finance for the Andrew Weir Group admitted. Moreover, in the event that Safbank was unable to satisfy any financial obligation, Bank Line and Safmarine's reservation of only secondary liability leaves the Fund with the potentially onerous task of securing monies from parties holding only remote responsibility. As already indicated, exceptions to withdrawal liability under MPPAA must be narrowly construed.

Moreover, besides encompassing situations like that in *Park South Hotel*, § 1369(b)(1) also covers *pro forma* matters like changes in corporate names or incorporation of a non-incorporated business. Since the formation of Safbank does not fall within any of these recognized categories, § 1369(b)(1) is inapplicable. Consequently, the arbitrator and the district court correctly concluded that the provisions of 29 U.S.C. § 1369(b) do not envisage the formation of a joint venture, like Safbank.

III. WAIVER OF SALE OF ASSETS CLAIM

The claim that the formation of Safbank was a sale of assets exempting Bank Line from withdrawal liability pursuant to 29 U.S.C. § 1384 (1988 & Supp. IV 1992) was not raised before the arbitrator. Appellants assert the district court abused its discretion when it ruled that such failure waived this claim. We disagree.

Appendix A

The MPPAA provides that:

> Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under [29 U.S.C. §§ 1381-1399] shall be resolved through arbitration.

29 U.S.C. § 1401(a)(1). We have interpreted the arbitration requirement as "an exhaustion of administrative remedies requirement," *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 886 (2d Cir. 1988), as have many other circuits, *see Trustees of Colo. Pipe Indus. Pension Trust*, 909 F.2d at 1385 (listing cases).

As previously observed in *Levy Brothers Frocks*, Congress envisioned that decisions regarding statutory interpretation under § 1384 "would be made by the arbitrator in the first instance." *Id.* Appellants do not fall within the narrow exception to the arbitration-first requirement under the MPPAA articulated in *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939, 945 (2d Cir. 1985). That exception has three prongs: (1) there must be no unresolved questions of fact or issues of contract interpretation; (2) review must be judiciously economical; and (3) the issue must fall "outside the scope of those issues that Congress directed to the arbitrator," that is, those determinations made under 29 U.S.C. §§ 1381-1399 pursuant to 29 U.S.C. § 1401(a)(1). *Id.* Because appellants argument here pertains to the applicability of 29 U.S.C. § 1384, it does not meet the third prong of *T.I.M.E.-DC, Inc.*'s arbitration exception.

Nor do the existing circumstances warrant the crafting of a new exception to the arbitration first rule. *See I.A.M. Nat'l Pension Fund Plan A v. Clinton Engines Corp.*, 825 F.2d 415, 422

(D.C. Cir. 1987) ("[A]n exception for cases raising questions of statutory interpretation would 'drastically diminish the prime role Congress so plainly assigned to arbitration in the MPPAA dispute resolution scheme.' ") (quoting *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 70 (D.C. Cir. 1987)). Thus, whatever merit the sale of assets argument under § 1384 may or may not have, it must first be made to the arbitrator. Not having been so made, the argument was waived.

CONCLUSION

Accordingly, for the reasons set forth above, the judgment of the district court is affirmed.

Appendix B

APPENDIX B - AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 12, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOWERS, et al., Plaintiffs, - against - ANDREW WEIR SHIPPING, LTD., et al. Defendants.	92 Civ. 3728 (PKL)
ANDREW WEIR SHIPPING LIMITED, et al., Plaintiffs, - against - NEW YORK SHIPPING ASSOCIATION-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION PENSION TRUST FUND, et al., Defendants.	92 Civ. 3781 (PKL)

AMENDED JUDGMENT

Appendix B

Plaintiffs as the Trustees for and on behalf of the NYSA-ILA Pension Trust Fund ("PTF") having instituted the action 92 Civ. 3728 to confirm and enforce an arbitration award sustaining PTF's imposition of withdrawal liability against South African Marine Corporation Ltd. in the amount of $1,404,752 and against Andrew Weir Shipping Ltd. in the amount of $252,181 pursuant to the provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the provisions of the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381-1453; and

Plaintiffs having moved to confirm and enforce the arbitration award and defendants having instituted the action 92 Civ. 3781 to vacate the arbitration award which action was consolidated with plaintiffs' action by agreement of the parties, and having moved to vacate the arbitration award and for summary judgment and said motions having come before the Honorable Peter K. Leisure, U.S.D.J., and the court thereafter on December 7, 1992 having handed down its memorandum opinion and order granting plaintiffs' motion to confirm and enforce and denying defendants' motions to vacate and for summary judgment, and judgment having been entered on January 22, 1993; and

Defendants having moved to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and the court thereafter on March 15, 1993 having handed down its memorandum opinion and order granting the motion; it is

ORDERED, ADJUDGED AND DECREED that the April 27, 1992 arbitration award is confirmed and enforced; and it is further

ORDERED, ADJUDGED AND DECREED that the action 92 Civ. 3781 is dismissed; and it is further

Appendix B

ORDERED, ADJUDGED AND DECREED that Defendant South African Marine Corporation Ltd. has incurred withdrawal liability in the principal amount of $1,404,752, which liability is being and shall continue to be paid in accordance with the schedule established by the NYSA-ILA Pension Trust Fund, attached hereto as Exhibit A, and that Defendant Andrew Weir Shipping Ltd. has incurred withdrawal liability in the principal amount of $252,181, which liability is being and shall continue to be paid in accordance with the schedule established by the NYSA-ILA Pension Trust Fund, attached hereto as Exhibit B.

Dated: New York, New York
April 12, 1993

S/S Peter K. Leisure
UNITED STATES DISTRICT JUDGE

This document was entered on
the docket on 4/13/93

Appendix B

NYSA-ILA PENSION TRUST FUND
WITHDRAWAL LIABILITY PAYMENT SCHEDULE
SOUTH AFRICAN MARINE CORP.

Date Payment Due	Amount
January 1, 1990	$95,981.00
April 1, 1990	95,981.00
July 1, 1990	95,981.00
October 1, 1990	95,981.00
January 1, 1991	95,981.00
April 1, 1991	95,981.00
July 1, 1991	95,981.00
October 1, 1991	95,981.00
January 1, 1992	95,981.00
April 1, 1992	95,981.00
July 1, 1992	95,981.00
October 1, 1992	95,981.00
January 1, 1993	95,981.00
April 1, 1993	95,981.00
July 1, 1993	95,981.00
October 1, 1993	95,981.00
January 1, 1994	95,981.00
April 1, 1994	74,665.00
TOTAL	$1,706,342.00

Appendix B

NYSA-ILA PENSION TRUST FUND
WITHDRAWAL LIABILITY PAYMENT SCHEDULE
THE BANK LINE, LTD.

Date Payment Due	Amount
January 1, 1990	$12,619.25
April 1, 1990	12,619.25
July 1, 1990	12,619.25
October 1, 1990	12,619.25
January 1, 1991	12,619.25
April 1, 1991	12,619.25
July 1, 1991	12,619.25
October 1, 1991	12,619.25
January 1, 1992	12,619.25
April 1, 1992	12,619.25
July 1, 1992	12,619.25
October 1, 1992	12,619.25
January 1, 1993	12,619.25
April 1, 1993	12,619.25
July 1, 1993	12,619.25
October 1, 1993	12,619.25
January 1, 1994	12,619.25
April 1, 1994	12,619.25
July 1, 1994	12,619.25
October 1, 1994	12,619.25
January 1, 1995	12,619.25
April 1, 1995	12,619.25
July 1, 1995	12,619.25

Appendix B

October 1, 1995		12,619.25
January 1, 1996		12,619.25
April 1, 1996		12,619.25
July 1, 1996		62.50
	TOTAL	$328,163.00

Appendix B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 15, 1993

JOHN BOWERS, et al., Plaintiffs,

—v.—

ANDREW WEIR SHIPPING, LTD., et al., Defendants.

ANDREW WEIR SHIPPING, LTD., et al., Plaintiffs,

—v.—

NEW YORK SHIPPING ASSOCIATION - INTERNATIONAL LONGSHOREMAN'S ASSOCIATION PENSION TRUST FUND, et al., Defendants.

BOWERS v. ANDREW WEIR SHIPPING, LTD.

92 Civ. 3728 (PKL), 92 Civ. 3781 (PKL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPEARANCES

THOMAS A. GLEASON, 26 Broadway, 17th Floor, New York, New York 10004, Maura R. Cahill, Esq., of counsel, ATTORNEYS FOR THE NYSA-ILA

Appendix B

PENSION TRUST FUND AND THE BOARD OF TRUSTEES.

MADDY, DALTON & LION, 405 Lexington Avenue, New York, New York 10174, Walter H. Lion, Esq., of counsel, ATTORNEYS FOR ANDREW WEIR SHIPPING, LTD., ET AL.

OPINION AND ORDER

LEISURE, District Judge,

This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). 29 U.S.C. §§ 1001-1461. On December 7, 1992, this Court issued an Opinion and Order granting the motion of The New York Shipping Association-International Longshoreman's Association Pension Trust Fund (the "Fund"), to confirm and enforce an arbitrator's award holding Andrew Weir Shipping, Ltd. ("Weir Shipping", formerly known as "Bank Line Limited") and South African Marine Corp., Ltd. ("Safmarine") liable for withdrawal obligations pursuant to 29 U.S.C. § 1381(a).[1] Judgment was entered on January 22, 1993. Weir Shipping and Safmarine now move the Court to alter or amend the Judgment in accordance with the provisions of Rule 59(e) of the Federal Rules of Civil Procedure. For the following reasons, the motion hereby

---

1 In accordance with Rule 15 of the Local Rules for Division of Business Among District Judges, the action numbered 92 Civ. 3781 (PKL) was accepted by the Court as a related case. The parties agreed to consolidate the actions and file consecutively their respective motions for confirmation and vacatur.

is granted. Familiarity with the facts underlying this action is presumed.

As an initial matter, this Court has jurisdiction to consider the Rule 59(e) motion despite the fact that it was filed subsequent to the filing of a notice of appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982); *Fisher v. Klein*, No. 88-9026 (2d Cir. Apr. 25, 1989); Fed. R. App. P. 4(a)(4) (a notice of appeal filed before disposition of a timely Rule 59 motion "shall have no effect"). A motion to amend a judgment pursuant to Rule 59(e) properly is granted where the movant demonstrates that the judgment is based upon manifest errors of law or fact. *See, e.g., Davidcraft Corp. v. Danu Int'l, Inc.*, 1992 U.S. Dist LEXIS 13845, *2-3 (S.D.N.Y. Sept. 15, 1992); *Wallace v. Brown*, 485 F. Supp. 77, 79 (S.D.N.Y. 1979).

The judgment entered by the Court in this action provided that

> plaintiffs have judgment against and recover from Defendant South African Marine Corporation Ltd. withdrawal liability in the principal amount of $1,404,752 and have judgment and recover from Defendant Andrew Weir Shipping Ltd. withdrawal liability in the principal amount of $252,181 which Defendants shall satisfy by paying the NYSA-ILA Pension Trust Fund.

Weir Shipping and Safmarine argue that this judgment is erroneous to the extent that it includes judgment for a sum certain. First, the defendants argue that plaintiff may not collect the full amount of withdrawal liability due as long as the defendants continue to make periodic payments as required by 29 U.S.C. § 1399 and the schedule calculated by the Fund. Second, defendants express concern that the judgment does not recognize that they have

satisfied the duty imposed by 29 U.S.C. § 1399 during the pendency of this action by making periodic payments and that the sums listed in the Judgment are therefore overstated to the extent that payment has already been made. Finally, defendants are concerned that plaintiffs may attempt to execute upon the judgment in Great Britain or South Africa and that local courts in those countries might be confused or misled by the judgment as entered by the Court. *See* Defendants' Memorandum of Law, at 3-4; Affidavit of Walter H. Lion, Esq., dated February 5, 1993, ¶ 8.

Section 1399 provides that "[w]ithdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor." 29 U.S.C. § 1399(c)(2). Further, acceleration of the entire amount owed occurs only in the event of a default, in which case the plan sponsor "may require immediate payment of the outstanding amount of an employer's withdrawal liability." 29 U.S.C. § 1399(c)(5). An employer is in default if it fails to make a withdrawal payment when due and does not cure such a failure within sixty days after the plan sponsor gives the employer notice of the failure to make a required payment. 29 U.S.C. § 1399(c)(5)(A).

It is undisputed that the defendants have continued to make payments in accordance with the schedule established by the Fund and that the defendants have not defaulted on the obligations imposed on them by the MPPAA. Thus, it is clear that the Fund is not entitled to the recovery of a sum certain at this juncture. Moreover, the arbitrator was without authority to render a judgment for a sum certain because the defendants continued to make installment payments on the withdrawal liability calculated by the Fund.

Accordingly, the Judgment shall be amended to indicate, in the manner of a declaratory judgment, that the defendants have

incurred withdrawal liability to the Fund in the principal amounts of $1,404,752 for Safmarine and $252,181 for Weir Shipping and that such liability is payable in accordance with the schedules established by the Fund, which should be attached to the Judgment as exhibits. The Judgment should not state that "plaintiffs have judgment against and recover" any sum certain from the defendants. Plaintiffs may, of course, pursue any remedy available under the MPPAA in the event that the defendants default on their obligations under the Judgment, as amended. Until such a default occurs, however, the Fund must be satisfied with receiving payments on the defendants' withdrawal liability as they become due, pursuant to the schedule set by the Fund.

CONCLUSION

For the foregoing reasons, the motion of defendants Andrew Weir Shipping, Ltd. and South African Marine Corp., Ltd. to amend or alter the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure hereby is granted. Plaintiff shall submit an amended judgment, consistent with this Opinion and Order, within thirty days.

SO ORDERED

Dated: March 15, 1993
New York, New York

Peter K. Leisure
U.S.D.J.

Appendix B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 7, 1992

JOHN BOWERS, et al., Plaintiffs,

—v.—

ANDREW WEIR SHIPPING, LTD., et al., Defendants.

ANDREW WEIR SHIPPING, LTD., et al., Plaintiffs,

—v.—

NEW YORK SHIPPING ASSOCIATION - INTERNATIONAL LONGSHOREMAN'S ASSOCIATION PENSION TRUST FUND, et al., Defendants.

BOWERS v. ANDREW WEIR SHIPPING, LTD.

92 Civ. 3728 (PKL), 92 Civ. 3781 (PKL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPEARANCES

THOMAS A. GLEASON, 26 Broadway, 17th Floor, New York, New York 10004, Maura R. Cahill, Esq., of counsel, Ernest L. Mathews, Jr., Esq., of counsel,

Appendix B

ATTORNEYS FOR THE NYSA-ILA PENSION TRUST FUND AND THE BOARD OF TRUSTEES.

MADDY, DALTON & LION, 405 Lexington Avenue, New York, New York 10174, Walter H. Lion, Esq., of counsel, ATTORNEYS FOR ANDREW WEIR SHIPPING, LTD., ET AL.

OPINION AND ORDER

LEISURE, District Judge,

This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). 29 U.S.C. §§ 1001-1461. The New York Shipping Association-International Longshoreman's Association Pension Trust Fund (the "Fund"), plaintiff in the action numbered 92 Civ. 3728 (PKL), seeks to confirm and enforce an arbitrator's award holding Andrew Weir Shipping, Ltd. ("Weir Shipping") and South African Marine Corp., Ltd. ("Safmarine") liable for withdrawal obligations pursuant to 29 U.S.C. § 1381(a).[1] Weir Shipping and

---

1 "Withdrawal liability" refers to the amount owed to a pension plan by an employer that terminates or reduces its contributions to the plan. *Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 657 F. Supp. 875, 876 n. 1 (N.D. Ill. 1987), *aff'd*, 875 F.2d 1285 (7th Cir. 1989). The withdrawal liability is the allocable share of unfunded vested benefits at the time of the employer's withdrawal, subject to certain adjustments. *See* 29 U.S.C. §§ 1381, 1391.

Appendix B

Safmarine, plaintiffs in the action numbered 92 Civ. 3781 (PKL),[2] seek to vacate the arbitrator's award, and further move for summary judgment on the liability issue. For the following reasons, the arbitrator's award is confirmed, and the motions of Weir Shipping and Safmarine to vacate the award and for summary judgment hereby are denied.

BACKGROUND

The Fund is a multiemployer pension fund established by collective bargaining between the New York Shipping Association and the International Longshoreman's Association to provide retirement benefits to longshore workers in the Port of New York. Bank Line and Safmarine are separately owned and controlled companies that were engaged in steamship carrier operations serving the Port of New York until 1988, when they formed a joint venture that, the Fund contends, resulted in a withdrawal from the Fund. Both companies were contributors to the Fund.

Bank Line was a wholly-owned subsidiary of Andrew Weir & Co., Ltd. ("Andrew Weir Group").[3] In 1980, a separate, unincorporated division within Bank Line began operating a cargo

---

2 In accordance with Rule 15 of the Local Rules for Division of Business Among District Judges, the action numbered 92 Civ. 3781 (PKL) was accepted by the Court as a related case. The parties agreed to consolidate the actions and file consecutively their respective motions for confirmation and vacatur.

3 Subsequent to the events at issue in these actions, Bank Line was consolidated with other subsidiaries of the Andrew Weir Group into a new company named Andrew Weir Shipping Limited ("Weir Shipping"). Weir Shipping, as Bank Line's corporate successor, is the party in this action representing the interests of the Andrew Weir Group.

service between the East Coast of the United States, including the Port of New York, and points in South and East Africa. Safmarine, a wholly-owned subsidiary of Safmarine and Rennies Holdings Limited ("Safren Group"), similarly had a separate, unincorporated division that engaged in cargo trade between the United States and South Africa. Rather than maintaining their own marine terminal facilities in New York, Bank Line and Safmarine contracted with other companies to provide these services. During the period they operated in New York, Bank Line and Safmarine both were members of the New York Shipping Association ("NYSA"), which acts as a multiemployer bargaining association on behalf of its members. NYSA negotiates and administers collective bargaining agreements with the International Longshoreman's Association ("ILA"), the collective bargaining representative for longshore workers employed in the Port of New York.

As NYSA members, Bank Line and Safmarine were covered by NYSA's bargaining agreement with ILA. The contract requires steamship carriers to pay NYSA assessments for employee benefits, based on total tonnage loaded and unloaded from the carrier's vessels by longshoreman in the Port of New York. NYSA passed along portions of these assessments to the Fund. Bank Line and Safmarine continued to pay assessments to the Fund until 1988.

On November 30, 1987, Safmarine and Bank Line entered into a joint venture agreement establishing Safbank as a company operating ships between South Africa and the United States. As part of the agreement, both Bank Line and Safmarine agreed to withdraw from the trade served by Safbank. Safmarine owns a 45% interest in Safbank. The remaining 55% is owned by Comeric Limited, a corporation that is 63% owned by Bank Line and 37% owned, albeit indirectly, by Safmarine. As a result of this structure, the Andrew Weir Group has voting control of Safbank, while

profits are distributed 65% to the Safren Group and 35% to the Andrew Weir Group. Safbank assumed the goodwill, reputations, and customer relationships of Bank Line and Safmarine. Safbank became bound by the collective bargaining agreement between NYSA and ILA by retaining an NYSA agent member as its general agent.

By letters dated November 8, 1989, the Fund advised Bank Line and Safmarine that it had received notice of their cessation of operations in the Port of New York and calculated the withdrawal liability to be $1,404,752 for Safmarine and $252,181 for Bank Line. Upon reconsideration pursuant to the joint request of Bank Line and Safmarine, the Fund reaffirmed its determination. Safbank, Weir Shipping, and Safmarine timely commenced an arbitration, as required by 29 U.S.C. § 1401(b). In the arbitration, Bank Line and Safmarine contended only that no withdrawals from the Fund occurred on their part due to the application of 29 U.S.C. § 1398(1) of the MPPAA.[4] They presented four sub-issues to the arbitrator for resolution:

> (1) who are the relevant pre-1988 employers; (2) did they cease to exist as employers for purposes of MPPAA upon the transfer of operations to Safbank in 1988; (3) was the resulting entity a change in corporate structure as envisioned by Section 4218(1) [29 U.S.C. § 1398(1)]; and (4) was there an interruption in contributions or the obligations to contribute to the Fund?

---

4 Although they argued to the Fund that the transaction was exempt from withdrawal liability under the sale of assets provision of section 1384 of the MPPAA, Bank Line and Safmarine did not present that issue to the arbitrator.

Appendix B

See Complaint, 92 Civ. 3728 (PKL), Ex. 1, Arbitrator's Findings, Opinion and Award (the "Award"), at 13. The arbitrator rendered the Award on April 27, 1992. He determined that the controlled groups of Bank Line and Safmarine, rather than the individual companies, were the statutory "employers" and the formation of Safbank was not a corporate change of the type contemplated by 29 U.S.C. §§ 1398(1) and 1369(b). Thus, the arbitrator determined that Bank Line and Safmarine were liable to the Fund for withdrawal obligations.

The Fund, by its Trustees, filed the action in 92 Civ. 3728 (PKL) to confirm and enforce the Award. The plaintiffs in 92 Civ. 3781 (PKL) timely commenced an action to vacate the arbitration award, pursuant to 29 U.S.C. § 1401(b), asserting that the arbitrator's conclusions of law were incorrect because:

> (1) transfer of the covered operations to Safbank was not a withdrawal due to the § 1398 exemption, since Safbank was formed by a reorganization of its parent groups, has an ongoing obligation to contribute, and continued contributions for the covered operations; (2) the award is inequitable because the withdrawal penalties from Weir Shipping and Safmarine are a double payment, with the Fund still collecting substantially the same assessments from the same operations carried on by the Joint Venture; and (3) *Korea Shipping* is no longer good law in view of *Darden*; Bank Line and Safmarine were not "employers" subject to statutory withdrawal liability.

See Weir Shipping Memorandum of Law at 8. Bank Line and Safmarine also argue that they should be exempted from withdrawal liability for this transaction pursuant to section 1384 of the MPPAA, which provides an exemption for certain sales of assets.

Appendix B

DISCUSSION

A. *Standard of Review*

An arbitrator's decisions on matters of law in an MPPAA withdrawal dispute are subject to full review by the district court. *See, e.g., Trustees of Colorado Pipe Indus. Pension Trust v. Howard Elec. & Mechanical, Inc.*, 909 F.2d 1379, 1386 (10th Cir. 1990); *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 211 (7th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989); *Union Asphalts and Roadoils, Inc. v. Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230, 1233-34 (8th Cir. 1988), *cert. denied*, 490 U.S. 1022 (1989); *Trustees of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 928-29 (9th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986); *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 234 U.S. App. D.C. 105, 727 F.2d 1204, 1207 n. 7 (D.C. Cir. 1984). The parties agree that there are no disputed issues of fact.

B. *Applicability of the Corporate Reorganization Provision*

Section 1398 of the MPPAA provides an exemption from withdrawal liability under certain circumstances:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because —
>
> (1) an employer ceases to exist by reason of —
>
> (A) a change in corporate structure described in section 4069(b) [29 U.S.C. § 1369(b)].

Appendix B

> 29 U.S.C. § 1398. Section 1369(b) describes certain particular changes in corporate structure that are exempted from withdrawal liability:
>
> (1) Change of identity form, etc. If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.
>
> (2) Liquidation into parent corporation. If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.
>
> (3) Merger, consolidation, or division. If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

29 U.S.C. § 1369(b). Bank Line and Safmarine challenge the arbitrator's determination that the section 1398 exemption for certain corporate changes did not apply to the formation of the Safbank joint venture.

The arbitrator found that the relevant "employers" for purposes of section 1398 were the controlled groups of Bank Line and Safmarine. Award at 20. Further, he determined that the "employers" had effectively "cease[d] to exist" within the meaning of that section. Award at 22. The arbitrator's focus, however, and that of the parties before this Court, concerned the issue of whether the formation of Safbank and the transfer to it of the unincorporated liner operations of Bank Line and Safmarine

constituted a corporate change contemplated by sections 1398(1) and 1369(b).

In *Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578 (2d Cir. 1988), *cert. denied*, 488 U.S. 966 (1988), the Second Circuit discussed the legislative purpose underlying section 1398:

> Congress did not intend to treat, as an employer withdrawal from a plan, mere changes in the form or structure of an employer that do not alter the employer's basic relationship with, participation in, or obligation to, the plan or change the nature of the employer's operations.

851 F.2d at 584. Thus, the Court declined to impose withdrawal liability where partners sold their interests to new partners, but the partnership continued to exist. Mere change in ownership, the Court ruled, was insufficient to constitute a withdrawal where the entity continued to be responsible for contributing to the pension fund. *Park South Hotel* does not apply to the Safbank joint venture because the case at bar presents a different scenario. Here, the contributing organizations--Bank Line and Safmarine--ceased operations in the Port of New York. They transferred their operations to a new entity, Safbank, that is not a member of either controlled group.[5] This was a significant change in the employers' obligations and altered their basic relationship to the Fund. Thus, Bank Line and Safmarine may not avail themselves of the exemption fashioned in *Park South Hotel*.

---

5 Under the definition of controlled group as used in ERISA, an organization is part of a controlled group if the group possesses at least 80% of the total stock value or at least 80% of the total voting power of the stock. *See* 26 C.F.R. § 1.414(c)-2(b). Thus, neither the Andrew Weir Group nor the Safren Group owns a controlling interest in Safbank.

Appendix B

Bank Line and Safmarine also rely on the Seventh Circuit's opinion in *Central States, Southeast & Southwest Areas Pension Fund v. Bellmont Trucking Co.*, 788 F.2d 428 (7th Cir. 1986), arguing that a joint venture should not incur withdrawal liability where there is no decrease in the level of employment. This analysis would prevent a determination of whether a withdrawal occurred until years after a transaction was effected. Although in the case at bar Safbank has contributed to the Fund amounts substantially equivalent to the combined previous contributions of Bank Line and Safmarine, in many joint ventures total contributions might be reduced. In fact, one might expect employment levels to decrease due to the economies of scale that might be achieved as a result of a successful joint venture. The Court rejects the suggestion that a determination of withdrawal liability must await evidence of a change in employment levels. While a showing that employment levels did not decrease in the wake of a joint venture is a requirement to qualify for the section 1398 exemption, it is not sufficient. Rather, the party seeking the exemption must demonstrate compliance with all the conditions of the statute. *Central States Pension Fund* does not support the position of Bank Line and Safmarine.

In designing a comprehensive scheme to regulate multiemployer plans and their contributing members, Congress failed to fashion a particular exemption for joint ventures. The legislative history and purposes do not permit the Court to corrupt the statutory scheme by creating broad exemptions to liability imposed under the MPPAA. Where parties to a transaction seek to avoid withdrawal liability, they must structure the transaction in a manner that comports with one of the specified exemptions.

One change exempted from withdrawal liability is a "reorganization which involves a mere change in identity, form, or

place of organization, however effected."[6] 29 U.S.C. § 1369(b)(1). The Court has determined that the joint venture is not encompassed within this provision. As the arbitrator observed, the formation of Safbank and the transfer of operations to it "involved the creation of an entirely new and separate corporate entity, without any of the original corporate entities changing its identity or form in any respect." Award at 22. Neither the language of section 1369(b)(1) nor the Second Circuit's decision in *Park South Hotel* support the contentions of Bank Line and Safmarine that they qualified under this provision for an exemption from withdrawal liability for this transaction.

Similarly, the formation of Safbank was not a "liquidation into a parent corporation." 29 U.S.C. § 1369(b)(2). Thus, section 1369(b)(2) does not provide a safe harbor for Bank Line and Safmarine.

The formation of the joint venture was not a "merger" or a "consolidation" within the meaning of section 1369(b)(3). These terms have well-established meanings within the corporate reorganization context. A merger is generally construed to be a transaction wherein two or more corporations combine and one of the corporations continues to exist, as the successor corporation. In a consolidation, two or more corporations combine together such that they all cease to exist and a new corporation emerges. The creation of Safbank can not properly be described as a merger or a consolidation. Initially, Bank Line's and Safmarine's divisions

---

6 Although Bank Line and Safmarine argue that the joint venture contains elements of various structural changes listed in section 1369(b), the Court will separately address each type of structural change. There is no "catch-all" provision in section 1369(b) that allows the Court to fashion a tailor-made exemption to withdrawal liability for this joint venture.

were not incorporated entities that were capable of engaging in this type of reorganization. More importantly, neither Bank Line nor Safmarine actually ceased to exist, as required by the definitions of merger and consolidation. Rather, they merely transferred certain functions or assets to the joint venture. Thus, Bank Line and Safmarine cannot claim that the formation of the Safbank joint venture constituted a merger or a consolidation such that they are exempted from withdrawal liability.

The sole remaining type of reorganization available to Bank Line and Safmarine is a "division." 29 U.S.C. § 1369(b)(3). Unlike the terms merger and consolidation, division does not appear to have an established meaning. The Pension Benefit Guaranty Corporation ("PBGC"), the governmental entity charged by Congress with the administration of the MPPAA's withdrawal liability provisions, has described as a "division" the distribution of stock of a corporate subsidiary to the shareholders of the parent. *See* PBGC Opinion Letter 85-29 (Dec. 5, 1985). Presumably, the following example provided in the report of the House Committee on Ways and Means on the MPPAA legislation would be another example of a division:

> P corporation owns 100% of the stock of S corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees . . . . If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S.

H. Rep. No. 96-869, Part II, 96th Cong., 2d Sess., 16 (1980), reprinted in 1980 U.S.C.C.A.N. at 3005-06; *see also* 126 Cong.

Appendix B

Rec. 20189, 20193 (July 29, 1980) (Joint Explanation by Chairmen of Senate Committees on Finance and Labor and Human Resources).

Thus, the term division, as used in the MPPAA, appears to connote a transaction whereby the stock of a contributing corporation is "divided" away from its controlled group and acquired by or distributed to new owners. As the Second Circuit held in *Park South Hotel*, mere changes in ownership do not precipitate withdrawal liability. 851 F.2d at 584. The formation of Safbank and the transfer to it of the liner operations of Bank Line and Safmarine does not fall within the scope of the definition of "division." In this case, unincorporated operations were transferred out of each controlled group. Accordingly, the Court has determined that this transaction may not properly be classified as a "division" for purposes of avoiding withdrawal liability.

Bank Line and Safmarine argue that their transaction is analogous to transactions that would be exempt from withdrawal liability, and that imposing liability on them elevates form over substance. They point to PBGC decisions indicating that an unincorporated division may be transferred under section 1398 without incurring withdrawal liability by *first* incorporating the division and then transferring the subsidiary's stock to the new owner, which continues covered operations. *See, e.g.*, PBGC Opinion Letter 90-1 (Mar. 29, 1990), PBGC Opinion Letter 85-15 (May 31, 1985), PBGC Opinion Letter 84-7 (Dec. 20, 1984). While Bank Line and Safmarine may be correct in their observation that Safbank's formation is analogous to exempted transactions, the prescribed requirements of the exemption were designed by Congress as part of a comprehensive scheme to ensure that multiemployer pension plans are protected from withdrawals by contributors that might leave the plan with extensive unfunded pension liability. The procedures available to contributing

organizations by which they may transfer their operations to a successor without incurring withdrawal liability are clearly defined by sections 1384 and 1398 of the MPPAA. It is not sufficient that a transaction be analogous to an exempted transaction. The failure to satisfy the statutory requirements results in a failure to qualify for an exemption from withdrawal liability.

Additionally, Bank Line and Safmarine argue that the Fund will be unjustly enriched if withdrawal liability is imposed because Safbank continues to make contributions to the Fund at a level that approximates the combined annual contributions previously made by Bank Line and Safmarine. No equitable argument, however, can overcome the failure of Bank Line and Safmarine to structure the transfer of operations to Safbank in a manner that conforms to the requirements of section 1398. The equitable claims of Bank Line and Safmarine do not overcome the failure to satisfy the requirements of the MPPAA. *See, e.g., Brentwood Financial Corp. v. Western Conference of Teamsters Pension Trust Fund*, 902 F.2d 1456, 1460 (9th Cir. 1990); *Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking Co.*, 788 F.2d 428, 433 (7th Cir. 1986); *Jaspan v. Certified Indus., Inc.*, 645 F. Supp. 998, 1005 (E.D.N.Y. 1985). Because Bank Line and Safmarine failed to satisfy the requirements of section 1398, they may not rely on that provision to avoid withdrawal liability under the MPPAA.

C. *Applicability of the Sale of Assets Provision*

Despite their failure to present the issue to the arbitrator, Bank Line and Safmarine argue that the Court should apply the provisions of section 1384 of the MPPAA and find that Safmarine is not liable for withdrawal obligations under the terms of that provision. Safmarine argues that the issue was raised and addressed by the arbitrator *sua sponte*, that presentation of the issue to the

Appendix B

Fund in the application to reconsider the determination of withdrawal liability sufficiently raised the issue, and that the Court has the authority to address for the first time on appeal issues of law that require no additional findings of fact. The Court has determined that all the grounds suggested by Safmarine are without merit and, therefore, the applicability of section 1384 is not properly before this Court.

Section 1401 of the MPPAA provides that:

> Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [29 U.S.C. §§ 1381-1399] shall be resolved through arbitration.

29 U.S.C. § 1401(a)(1). The arbitration provision of the MPPAA constitutes an exhaustion of administrative remedies requirement. *See, e.g., ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 886 (2d Cir. 1988); *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939, 944-45 (2d Cir. 1985). In *T.I.M.E.-DC*, however, the Second Circuit held that the exhaustion doctrine was not implicated in that case, despite the plaintiff's failure to proceed to arbitration prior to filing suit, because: (1) there were no issues of fact to resolve; (2) the Court expected that the parties would seek judicial review of any decision an arbitrator might have reached; and (3) the section of the MPPAA that was the subject of the suit, section 1415, was "outside the scope of those issues that Congress directed to the arbitrator." 756 F.2d at 945. Thus, the Court excused the failure to submit the dispute for arbitration.

The exhaustion requirement fashioned in *T.I.M.E.-DC* does not apply to the instant case. Although there are no contested issues of fact, the statute clearly requires that disputes arising under

section 1384 of the MPPAA must be resolved, in the first instance, by arbitration. Furthermore, the purposes of the arbitration provision would be subverted if a litigant could advance new legal theories at each stage of the dispute resolution process. Bank Line and Safmarine effectively abandoned any claim under section 1384 by failing to pursue that theory in the arbitration proceedings. Although the failure to exhaust administrative remedies may lead to harsh results, as the Second Circuit has noted, "the harshness of the default is largely 'a self-inflicted wound.' " *ILGWU Nat'l Retirement Fund*, 846 F.2d at 887 (quoting *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 129 (3d Cir. 1986)).

Moreover, the Court rejects the suggestion that the arbitrator raised the section 1384 exception *sua sponte* and determined that the exception would apply in this case. Rather, the arbitrator's discussion compared the requirements of section 1384 to those of section 1398 in determining whether the corporate reorganization exemption properly applied. The arbitrator explicitly stated that no section 1384 issues were presented to him and he therefore had "no occasion to consider them." Award at 26 n. 9.

Bank Line and Safmarine have failed to preserve for review by this Court any issue regarding the applicability of section 1384. Because of their failure to exhaust administrative remedies, Bank Line and Safmarine are barred from presenting this issue at this late juncture.

D. *Were Bank Line and Safmarine "Employers" under the MPPAA?*

Bank Line and Safmarine next argue that they are not "employers" within the meaning of the MPPAA and thus are not liable for withdrawal penalties. Recognizing that the Second

Appendix B

Circuit's decision in *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (1989), if still good law, compels a finding that they are "employers," Bank Line and Safmarine argue that a recent Supreme Court decision undermines the *Korea Shipping* decision and requires the Court to apply a common law definition of "employer." *See Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992). Bank Line and Safmarine would not be encompassed within a common law definition of "employer."

Recognizing that the MPPAA itself contains no definition of the term "employer," the *Korea Shipping* Court looked to the definition of "employer" in Title I of ERISA to inform its definition. 880 F.2d at 1536. Title I of ERISA, although not applicable of its own force, informs the definition of "employer" as that term is used in the MPPAA. An employer is

> any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan.

29 U.S.C. § 1002(5). The Second Circuit, considering the purposes and policies underlying the MPPAA, determined that the common law definition of employer was too restrictive to accomplish the purposes of the MPPAA. 880 F.2d at 1537. The Court stated that:

> [T]o adopt the meaning of the word employer the appellants urge would open a gaping hole in many multiemployer plans. Such a common law definition of employer would eliminate withdrawal liability for such a significant number of contributors as to threaten those plans' financial viability and potentially make them victims of the precise threat Congress aimed to shield them from when it enacted the MPPAA.

880 F.2d at 1537. The Court thus ruled that the purposes of the MPPAA required a definition of "employer" that was broader than the common law definition. Bank Line and Safmarine concede that they would be considered employers under the Second Circuit's analysis in *Korea Shipping*.

In *Darden*, the Supreme Court rejected the Fourth Circuit's suggestion that the common law definition of the term "employee" was too narrow to effectuate the purposes of ERISA. 112 S. Ct. at 1348-50. Critical to the Court's determination was the fact that the ERISA definition was vexatiously circular: "any individual employed by an employer" is considered an employee under ERISA. 29 U.S.C. § 1002(6). Thus, the statute's language was singularly unhelpful. Justice Souter, writing for a unanimous Court, lamented the recurring difficulties the courts have encountered in attempting to define the term "employee" in various federal statutes, noting that Congress has repeatedly amended a statute to prescribe the use of a common law definition of "employee" after a Supreme Court decision broadened the scope of that term. *Compare NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111, 120-29 (1944) (using broad definition of "employee" for NLRA) *with NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (discussing amendment of NLRA after *Hearst Pubs.*); *and compare United States v. Silk*, 331 U.S. 704 (1947) (broad definition for purposes of Social Security Act) *with United States v. W.M. Webb, Inc.*, 397 U.S. 179, 183-88 (1970) (discussing Congressional reaction to *Silk*).

The Court explicitly distinguished the *Darden* case from *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), where the Court applied a broad definition of "employee" because the language of the Fair Labor Standards Act indicated that Congress intended to include within the definition certain persons who would not be defined as employees under the common law. 112 S. Ct. at

1350. Additionally, the flexibility and indeterminacy of the test fashioned by the Fourth Circuit to determine when a person is an employee clearly informed the Supreme Court's decision. In determining whether a person was an employee, the Fourth Circuit would consider the expectation of the employee regarding his entitlement to benefits, reliance on that expectation, and disparity of bargaining power. See *Darden v. Nationwide Mutual Ins. Co.*, 922 F.2d 203, 205 (4th Cir. 1991). The Supreme Court complained that

> Any such approach would severely compromise the capacity of companies like Nationwide to figure out who their "employees" are and what, by extension, their pension-fund obligations will be.

112 S. Ct. at 1350.

Darden clearly does not affect the vitality of *Korea Shipping*. First, the definition of "employer" in ERISA, unlike the definition of "employee," clearly indicates legislative intent to extend the definition beyond the traditional common law definition. By including within the definition of employer any person who acts "indirectly in the interest of an employer, in relation to an employee benefit plan," 29 U.S.C. § 1002 (5), the statute on its face extends beyond the common law definition.

Further, Bank Line and Safmarine can hardly argue that this definition of employer impedes their ability to calculate their ERISA obligations. Under *Korea Shipping*, persons who are contractually obligated to pay an assessment to another organization, in the instant case NYSA, which acts as a conduit to channel part of the assessments to a pension fund, are considered "employers" and are subject to withdrawal liability. The purposes of the MPPAA properly are served by adhering to the Second

Appendix B

Circuit's definition of employer in *Korea Shipping*. The Court therefore finds that Bank Line and Safmarine are employers within the meaning of the MPPAA and are liable for withdrawal obligations pursuant to 29 U.S.C. § 1381(a).

CONCLUSION

For all the foregoing reasons, the motion to confirm the arbitration is granted. Judgment in *Bowers v. Andrew Weir Shipping, Ltd.*, 92 Civ. 3728 (PKL), shall be awarded to plaintiffs. Defendant South African Marine Corp., Ltd., is liable to the NYSA-ILA Pension Trust Fund for withdrawal liability in the amount of $1,404,752. Defendant Andrew Weir Shipping, Inc., is liable to the NYSA-ILA Pension Trust Fund for withdrawal liability in the amount of $252,181. With respect to *Andrew Weir Shipping, Ltd. v. NYSA-ILA*, 92 Civ. 3781 (PKL), the motion to vacate the arbitration is denied and the motion of plaintiffs for summary judgment is denied.

SO ORDERED

Dated: December 7, 1992
New York, New York

Peter K. Leisure
U.S.D.J.

Appendix C

APPENDIX C - AMERICAN ARBITRATION ASSOCIATION MULTIEMPLOYER PENSION PLAN WITHDRAWAL LIABILITY ARBITRATION DATED APRIL 27, 1992

In the matter of Arbitration Between

ANDREW WEIR SHIPPING LIMITED, FORMERLY KNOWN AS THE BANK LINE LIMITED, SOUTH AFRICAN MARINE CORP. LIMITED, AND THE SAFBANK LINE LIMITED, AS SUCCESSOR IN INTEREST,

Complainants

NEW YORK SHIPPING ASSOCIATION-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION PENSION TRUST FUND AND THE BOARD OF TRUSTEES OF THE NYSA-ILA PENSION TRUST FUND,

Respondents.

AAA Case No. 13-621-00007-91

ARBITRATOR'S FINDINGS,
and
OPINION AND AWARD

ARBITRATOR: Robert E. Nagle

APPEARANCES:

For Complainants: Walter H. Lion
Maddy, Dalton & Lion

Appendix C

New York, New York

For Respondents: Maura R. Cahill
Thomas W. Gleason
New York, New York

INTRODUCTION

This arbitration was initiated pursuant to Section 4221 of the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), to review assessments of withdrawal liability by the NYSA-ILA Pension Trust Fund (the "Fund") against Bank Line Limited ("Bank Line") and South African Marine Corporation Limited ("Safmarine").

The arbitrator was selected and the proceedings conducted in accordance with the Mutliemployer Pension Plan Arbitration Rules of the American Arbitration Association. A hearing was held in New York, N.Y. on October 24, 1991, at which testimony was taken and exhibits received in evidence. Briefs and reply briefs were thereafter submitted on behalf of the parties.

THE PARTIES AND PROCEDURAL HISTORY

The Fund is a multiemployer pension fund established by collective bargaining between the New York Shipping Association and the International Longshoremen's Association to provide retirement benefits to longshore workers in the Port of New York.

Bank Line and Safmarine are separately owned and controlled companies which, until sometime in 1988, had been engaged in steamship carrier operations serving the Port of New

York. As discussed more fully below, both companies were contributors to the Fund.

By letters dated November 8, 1989, the Fund notified Safmarine and Bank Line that it had been advised of their cessation of operations in the Port of New York during 1988, and that the Fund's actuary had calculated their withdrawal liability under the provisions of MPPAA. In the case of Safmarine that liability was $1,404,752. In the case of Bank Line, the liability was calculated as $252,181.

Pursuant to Section 4219 of the Act, Bank Line and Safmarine jointly requested review of the Fund's withdrawal liability determinations, following which the Trustees reaffirmed those determinations. Bank Line and Safmarine then jointly initiated this arbitration in accordance with Section 4221 of the Act. Although a number of issues were raised by the two companies in their request for review by the Trustees, their contention in this arbitration is limited to the proposition that under Section 4218(1) of the Act there was no withdrawal on their part since the covered operations which they previously conducted are being continued by Safbank Line Limited ("Safbank"), a joint venture formed by Bank Line and Safmarine, with no interruption of contributions to the Fund.

As required by Section 4219(c) of the Act, Bank Line and Safmarine have been making quarterly withdrawal liability payments in accordance with the schedule established by the Fund.

SUMMARY OF FACTS

This case involves the two contributing companies named above, as well as their respective corporate groups — the Andrew Weir Group and the Safmarine and Rennies Group — and their

Appendix C

formation of a separately-incorporated joint venture in 1988. The pertinent facts are not in dispute and may be summarized as follows:

1. Bank Line and the Andrew Weir Group

Bank Line, a company organized under the laws of Scotland, with its principal place of business in London, was a wholly-owned subsidiary of Andrew Weir & Co. Ltd., also a Scottish company. The latter is the parent of a diverse corporate group with activities that include shipping, stevedoring, freight forwarding, engineering, travel and tours, hotels, insurance, commodity trading and investments. The Andrew Weir Group is privately owned, with its entire equity held by the Weir family and charitable trusts.

In 1980, Bank Line, which had been established as a shipping company in 1905, began operating a regularly scheduled cargo service between the East Coast of the United States, including the Port of New York, and points in South and East Africa. This operation was considered a separate division within Bank Line.

Bank Line did not have its own marine terminal facilities in the Port of New York. Instead it contracted with terminal operators and engaged stevedoring companies, which hired longshoremen to load and discharge the Bank Line vessels.

During its period of operations in the Port of New York, Bank Line was a member of the New York Shipping Association ("NYSA"), which acts on behalf of its members as a multiemployer bargaining association in the negotiation and administration of collective bargaining agreements with the International Longshoremen's Association ("ILA"). The latter is

the collective bargaining representative for longshore workers employed in the Port of New York.

As a member of NYSA, Bank Line was covered by the longshore labor contact negotiated by NYSA and ILA. The contract requires steamship carriers to pay to NYSA assessments for employee benefits, based on total tonnage loaded and unloaded from the carriers' vessels by longshoremen in the Port. Portions of these assessments are, in turn, paid by NYSA to the Fund.[1] During the period of its operations in the Port of New York, Bank Line complied with its assessment obligations under the labor agreement.

Subsequent to the events at issue here, on January 1, 1989, Bank Line and the transport-related subsidiaries of the Andrew Weir Group were consolidated into a new company called Andrew Weir Shipping Limited.

2. Safmarine and the Safren Group

Safmarine, a company organized under the laws of South Africa, with its principal place of business in Capetown, was established in 1946. Since 1984 it has been a wholly-owned subsidiary of Safmarine and Rennies Holdings Limited ("Safren"), which is incorporated in South Africa. Safren is the parent of a corporate group with subsidiaries engaged in shipping, freight forwarding, airline ownership, hotel and casino ownership, film and television production, restaurants, fast food, liquor wholesaling and retailing, travel and insurance brokering.

---

1 These arrangements for financing the Fund, and the status of the carriers as contributing employers, are discussed in detail in *Korea Shipping Corp.* v. *NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989).

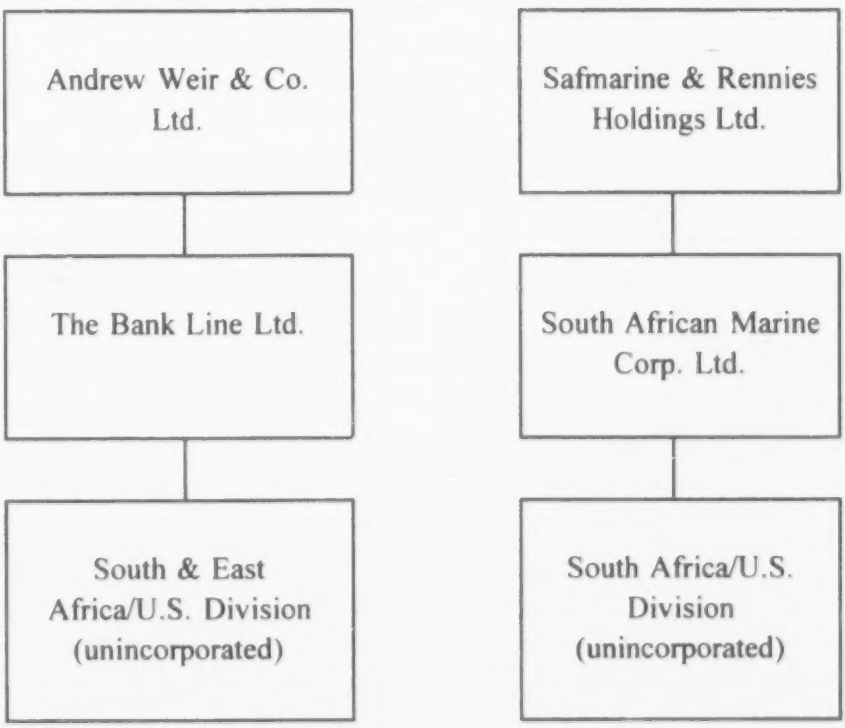
Appendix C

Prior to 1988 Safmarine engaged in ocean liner cargo trade between the United States and South Africa, such operation functioning as a separate division within Safmarine. Like Bank Line, Safmarine was a member of NYSA and contributed in similar fashion, through NYSA, to the Fund and to other benefit programs for the longshoremen hired by stevedoring companies with which it contracted in the Port of New York.

3. Pre-1988 Corporate Organizations

Prior to 1988 and the events at issue here, the structures of the Andrew Weir and Safren groups, excluding all irrelevant subsidiaries, may be shown as follows:

PRE-1988 CORPORATE ORGANIZATION



Appendix C

4. Formation of the Safbank Joint Venture

In an effort to cut costs and improve their competitive positions with respect to other carriers, Bank Line and Safmarine entered into a "space charter agreement" in 1985. Under this agreement the two companies were able to jointly schedule their ships in a convenient manner, each carrying cargo for the other. The joint scheduling allowed each carrier to reduce the number of vessels operated, yet offer cargo shippers more frequent sailings between the United States and South and East Africa.

The joint operational experience under the space charter agreement prompted the idea of fully merging the two operations, thereby eliminating all duplication of activities, including redundant representation in the United States and South Africa. It was also anticipated that each carrier might experience a reduction of cargo as a result of the enactment in 1986 of legislation which imposed limitations on trade between the United States and South Africa.

Consequently, Bank Line and Safmarine adopted a joint venture agreement, dated November 30, 1987, to establish Safbank as a company registered in the United Kingdom, operating ships between South Africa and the United States. As part of the agreement, Bank Line and Safmarine agreed to withdraw from the trade served by Safbank.

Safmarine owns a 45% interest in Safbank. The other 55% interest is owned by a company called Comeric Limited ("Comeric"), which is an English company, 63%-owned by Bank Line. The remaining 37% of Safbank is owned by Palpera Handels & Finanz, a Swiss company which, through an intermediary subsidiary, is wholly owned by Safmarine. Due to

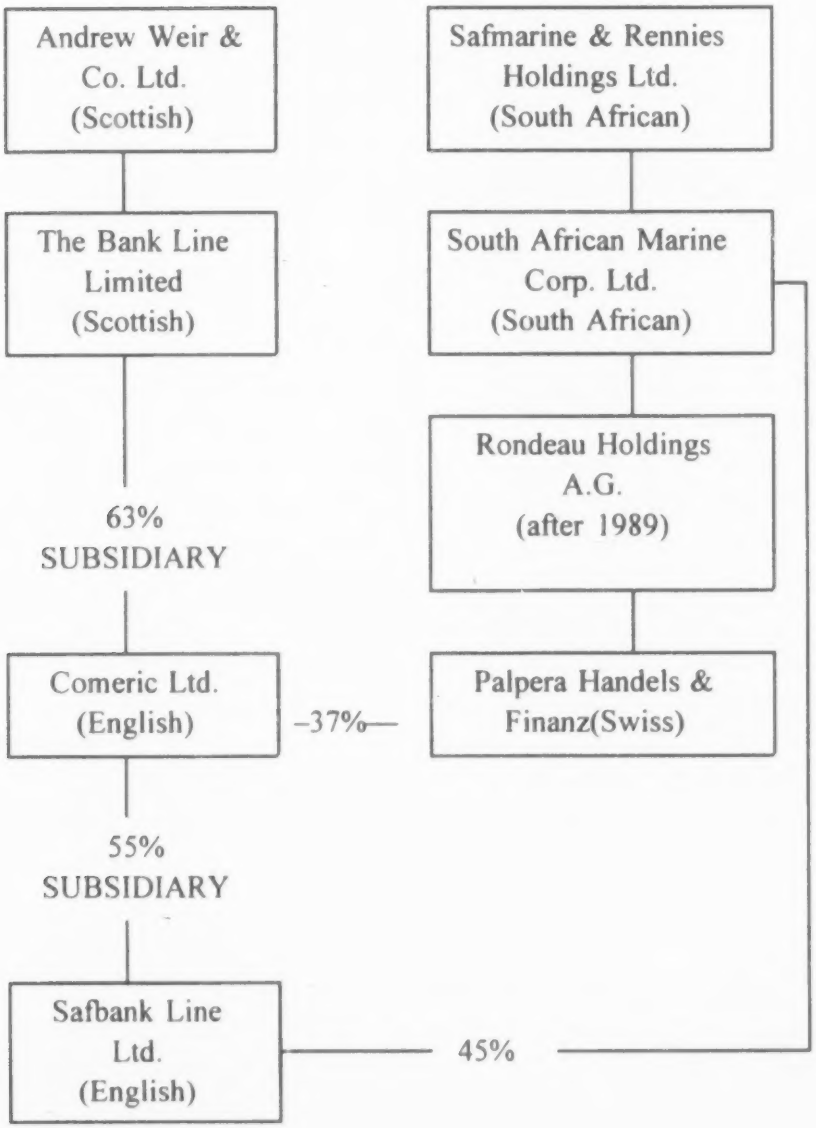
this structure, the Andrew Weir group has voting control through its subsidiary, Comeric, while profits are shared in a ratio of 35% to the Andrew Weir Group and 65% to the Safren Group. The Safbank board of directors consists of three directors nominated by the Andrew Weir Group and three directors nominated by Safren.

Upon formation of Safbank, the organizations of the Andrew Weir and Safren Groups, again eliminating irrelevant subsidiaries, may be shown as follows:

Appendix C

1988 CORPORATE ORGANIZATION

SAFBANK LINE LIMITED



Appendix C

In July 1988, the parties modified their agreement to provide for the establishment of a second company, the Bank Line East Africa Limited ("BLEA"), with ownership similarly within the Andrew Weir and Safren Groups. The purpose of forming BLEA was to obtain northbound cargo from East Africa to balance Safbank's heavily southbound operation to South Africa. Under the joint venture agreement, BLEA and Safbank share vessels, chartering space among each other.

The principal assets taken over by Safbank were the goodwill, reputations and customer relationships of Bank Line and Safmarine. Safbank owns no vessels directly. The ocean vessels used in the business, as was the case prior to the joint venture, are generally chartered from companies within the Andrew Weir or Safren Groups or from third parties. The other main assets used in the shipping business are cargo containers and truck chassis for delivering cargo. Safbank began operations with essentially the same container equipment that Safmarine had formerly used, some of which was leased form third parties, but most of which was owned by companies in the Safren Group.

Safbank became bound by the collective bargaining agreement between NYSA and the ILA by virtue of retaining a NYSA agent member as its general agent.

Since the formation of Safbank and BLEA, contributions to the Fund from the transferred operations have continued at a

level approximately equivalent to the pre-transfer combined contribution histories of Bank Line and Safmarine.[2]

5. Other Relevant Events

In November 1987, prior to adoption of the joint venture agreement, a Safmarine representative, Captain Riley, asked counsel for NYSA whether the formation of Safbank would have any consequences in terms of the Fund. The response, as Captain Riley understood it, was that if there was no sale of assets Safbank could assume Safmarine's and Bank Line's liabilities and those two lines would be released from further obligation. Subsequently, in January, 1988, Captain Riley wrote to the president of NYSA, advising that the establishment of Safbank had received Federal Maritime Commission approval, and that its service would commence February 1, 1988. The letter also stated that "Safbank Line will assume the withdrawal liability as required by the NYSA and in turn Safmarine, Inc. and Bank Line will no longer be liable," and requested confirmation that this would be in order.

There was no written response to this letter, but Captain Riley testified that in subsequent conversation with a NYSA official he was informed that "there could be a problem with the

---

2 Based on Fund records the pertinent contributions figures, as shown in Employers' Exhibit 32, are as follows:

Year	Carriers	Total Fund Contributions
1986	Safmarine & Bank Line	$113,199
1987	Safmarine & Bank Line	$177,917
1988	Safmarine, Bank Line & Safmarine	$196,065
1989	Safbank & BLEA	$171,387
1990	Safbank & BLEA	$145,473

arrangements as we envisioned it." He further testified that he then met with Fund attorneys in May, 1988, and was advised that the Fund "would probably collect a withdrawal liability." By amendment dated November 10, 1988, the parties modified the joint venture agreement to add the following provision:

> [I]n consideration of the agreement of Safmarine and Bank Line to withdraw from the liner trade served by Safbank, and to transfer the assets in the trade served by Safbank to Safbank, Safbank has agreed to assume any liability of Safmarine and Bank Line to multi-employer pension plans for the trade, for which, however, Safmarine and Bank Line shall remain secondarily liable as required by law, and may indemnify Safbank in respect thereof.

Counsel for the companies then wrote to a Fund attorney, explaining the formation of the joint venture, and setting forth the argument that the formation of Safbank would not result in withdrawal of Safmarine and Bank Line in view of the corporate reorganization provisions of Sections 4218(1) and 4069(b) of the Act. Counsel also stated his view that in the alternative, the transaction would qualify for the "sale of assets" exception provided by Section 4204 of the Act. He advised that the joint venture agreement had been amended to include the secondary liability provision required by Section 4204, and further, that Safbank would provide the Fund with a surety bond in an amount required by that Section. At the end of December, 1988, a surety bond was forwarded to the Fund in the amount of $2,300,000 as security against any withdrawal by Safbank for a period of five years from January 1, 1989. The bond was accepted by the Fund without prejudice to its own determination of whether Section 4204 applied to the transaction.

Appendix C

Thereafter, in November, 1989, the Fund assessed withdrawal liability against Bank Line and Safmarine (see pp. 2-3, supra). The request for review by those two companies — which asserted claims to the exceptions provided by both Section 4218(1) and Section 4204 of the Act as well as other issues — was denied by the Fund's Trustees.

STATUTORY PROVISIONS INVOLVED

Section 4218(1) of ERISA (29 U.S.C. § 1398(1)) provides as follows:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because —
>
> (1) an employer ceases to exist by reason of —
>
> (A) a change in corporate structure described in Section 4069(b), or
>
> (B) a change to an un-incorporated form of business enterprise.
>
> if the change causes no interruption in employer contributions or obligations to contribute under the plan . . .

Section 4069(b) of ERISA (29 U.S.C. § 1369(b)) provides as follows:

> For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

Appendix C

(1) Change of identity, form, etc. — If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such re-organization shall be treated as the person to whom this subtitle applies.

(2) Liquidation into parent corporation. — If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.

(3) Merger, consolidation, or division. — If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

CONTENTIONS OF THE PARTIES

The Complainants' Contentions

In this arbitration Bank Line and Safmarine (the "Complainants") contend only that no withdrawals from the Fund occurred on their part due to the application of the above-quoted Section 4218(1) of the Act.

The Complainants assert that four sub-issues must be resolved by the Arbitrator in reaching a decision on this issue. These are: (1) who are the relevant pre-1988 employers; (2) did they cease to exist as employers for purposes of MPPAA upon the transfers of operations to Safbank in 1988; (3) was the

resulting entity a change in corporate structure as envisioned by Section 4218(1), and (4) was there an interruption in contributions or the obligations to contribute to the Fund?

With respect to the first question, the Complainants contend that the answer is governed by Section 4001(b)(1) of ERISA, which provides that for purposes of Title IV of ERISA (of which the withdrawal liability provisions are a part), "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." Thus, the relevant "employers" prior to the 1988 transfers were not Safmarine and Bank Lines — the two contributing entities — but rather were their entire respective controlled groups — *i.e.*, the Andrew Weir and Safren Groups.

With respect to the second question, the Complainants contend that when the composition of a controlled group changes due to the addition or subtraction of a subsidiary or an unincorporated business within the controlled group, the controlled group ceases to exist in its prior form, and a new controlled group is formed. The Complainants cite the following language from the House Committee on Ways and Means report on the MPPAA legislation, describing how the controlled group concept relates to the requirement in Section 4218(1) that the employer "cease to exist":

> A withdrawal does not occur, however, where an employer ceases to exist merely by reason of a change in form or structure, as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contribution to the plan or obligation to contribute under the plan. For example, if P corporation owns 100% of the stock of S corporation,

> a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change of ownership of S.[3]

This language, argue the Complainants, demonstrates that Congress did not equate the words "an employer ceases to exist" with the complete cessation of corporate existence. In the present instance, they contend, when Safren and Andrew Weir divided their unincorporated liner operations in the United States/South and East Africa trades from their other businesses, they changed their corporate structures. At that point the former Andrew Weir and Safren controlled groups ceased to exist as employers because they no longer contained the former unincorporated United States/South and East Africa liner divisions of Safren and Andrew Weir.

The Complainants next contend that the joint venture's formation is a type of corporate change that Congress intended Section 4218(1) to exempt from withdrawal liability. The process involved the two controlled groups dividing from the rest of their business activities certain unincorporated liner operations, and

---

3 H. Rep. No. 96-869, Part II, 96th Cong. 2d Sess. 16 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News at 3005-06 (emphasis supplied). Virtually identical language is contained in the Joint Explanation provided by the Chairmen of the Senate Committees on Finance and Labor and Human Resources prior to Senate consideration of MPPAA bill. 126 Cong. Rec. 20189, 20193 (July 29, 1980).

merging those two businesses into Safbank. Thus, argue the Complainants, the joint venture's formation contained elements of a "division," "a merger", and a mere change of identity or form, all of which are covered by Section 4069(b), and thereby incorporated in Section 4218(1).

Finally, the Complainants point out that Safbank has continued Bank Line's and Safmarine's contributions and has remained obligated to the Fund without interruption for the same covered operations. In this regard the Complainants state that because Safbank's representative in the United States is a NYSA member, Safbank is bound by the NYSA-ILA collective bargaining agreement, including the requirement for payment of cargo tonnage assessments which are the source of contributions to the Fund. They also point out that Safbank's contributions have, in fact, remained at a level roughly equivalent to the pre-1988 combined contributions of Safmarine and Bank Line.

Beyond these specific items, the Complainants argue that the formation of Safbank was triggered by business considerations — mainly the desire to stem losses by achieving greater operating efficiencies — and that there has never been any attempt to avoid pension liability. They point out that in addition to assuring the Fund that contributions would continue by Safbank, both Bank Line and Safmarine made the further effort to reassure the Fund by providing a surety bond for over $2 million and by guaranteeing the Fund that they would pay any withdrawal liability that might thereafter be incurred by Safbank.

The Fund's Contentions

The Fund does not dispute that Safbank has an obligation to contribute to the Fund within the meaning of the statute, nor does it dispute that contributions have been made by Safbank at

a level comparable to the combined pre-1988 contributions of Bank Line and Safmarine. It does, however, dispute the Complainants' arguments with respect to the other three sub-issues advanced by them. It contends, in this regard, that the Complainants have attempted to impose on the terms "employer," "cease to exist", and "change in corporate structure" meanings that are strained and novel.

In the first place, the Fund argues, the "employer" which must cease to exist for purposes of applying Section 4218(1) is the contributing entity, and not the entire controlled group. The intent of Section 4001(b)(1), according to the Fund, is to treat all trades or businesses under common control as a single employer only for purposes of collecting withdrawal liability once a withdrawal has occurred. In the Fund's view, there is no authority holding that "employer" and "controlled group" are intended to be synonymous throughout ERISA.

Secondly, the Fund argues, regardless of whether the relevant "employers" for purposes of the present case are to be regarded as the two contributing entities or the two controlled groups, they did not cease to exist after the establishment of Safbank in 1988. Safmarine remained in existence, and continued as part of the controlled group headed by Safren. Similarly, Bank Line remained in existence, and continued to be part of the controlled group headed by Andrew Weir & Co. The fact that certain unincorporated liner operations were "divided out" of those companies does not mean those companies ceased to exist.

Finally, as discussed more fully below, the Fund argues that the creation of Safbank and the transfer of covered operations to it did not involve any of the types of change in corporate structure which are referred to in Sections 4218(1) and 4069(b).

Appendix C

DISCUSSION

Section 4203(a) of the Act provides that a complete withdrawal from a multiemployer pension plan occurs when an employer "permanently ceases to have an obligation to contribute under the plan" or "permanently ceases all covered operations under the plan." Thus, when Bank Line and Safmarine discontinued their covered operations and transferred such operations to Safbank in 1988, those two companies — or, more accurately, their respective controlled groups (see discussion below) — must be regarded as having withdrawn from the Fund, absent the application of a pertinent statutory exception.

In this proceeding the Complainants have relied upon the exception provided by Section 4218(1) of the Act (set forth at pp. 12-13) which, insofar as pertinent here, provides that "an employer" shall not be considered to have withdrawn from a plan solely because the employer "ceases to exist" by reason of a change in corporate structure described in Section 4069(b). The latter, in turn, refers to certain "corporate reorganizations", which include "mere change in identity, form or place of organization," "liquidation into a parent corporation", and "merger, consolidation or division."

In arguing over the applicability of Section 4218(1) to the facts at hand, the parties first disagree as to which entities are to be regarded as "the employer" for purposes of that section, as well as the meaning of the "cease to exist" language of Sections 4218(1) and 4069(b). While I do not believe that these particular questions are the critical ones here, I address them briefly in view of the attention given them by the parties.

Insofar as the term "employer" is concerned, Section 4001(b)(1), as previously noted, provides that for purposes of

Appendix C

Title IV of ERISA, all trades or businesses which are under common control shall be treated as a single employer.[4] While the Fund contends that this definition applies only for purposes of imposing joint and several liability on the affiliates of a withdrawn employer, and that for all other purposes each of the two contributing entities was "the employer", this is not the established understanding. See, *e.g.*, *Robbins v. Pepsi Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D.Ill. 1986), where the court specifically rejected the argument that the controlled group definition "should only be used to determine who will be liable for a withdrawal liability assessment, and that issues regarding the fact of a withdrawal or the calculation of liability should be resolved on a corporation-by-corporation basis", and concluded instead that the definition "clearly applies to all decisions relating to withdrawals from multiemployer plans." And in *Dyck v. Southern Pacific Milling Co.*, 4 EBC 1346 (C.D. Cal. 1983), the court applied the same conclusion in holding that there was no withdrawal when covered operations were transferred from one corporate member of a controlled group to another. See also PBGC Opinion Letters 82-13 (Apr. 12, 1982) and 85-29 (Dec. 5, 1985); and *Employee Benefits Law*

---

4 Section 4001(b)(1) provides that the meaning of its terms shall be defined by regulations of the Pension Benefit Guaranty Corporation, which regulations shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code. Accordingly, the implementing PBGC regulation (29 C.F.R. Part 2612) states that the operative terms have the same meaning as in Section 414(c) of the Code and the regulations issued thereunder. Consequently, the definitive regulations are those set forth in Treas. Reg. § 1.414(c)-2.

In the case of groups consisting of a parent and subsidiary corporations, such as those involved in the instant case, a controlled group consists of those entities connected through ownership of stock possessing at least 80 percent of total value of shares or of voting power. Treas. Reg. § 1.414(c)-2(b).

Appendix C

(ABA Section of Labor & Employment Law - BNA Books, 1991) at 769.

Accordingly, I believe the Complainants are correct in arguing that each of their respective controlled groups was "the employer".

With respect to the meaning of the "cease to exist" language of Sections 4218(1) and 4069(b), it is evident that certain types of corporate reorganizations referred to will necessarily result in a corporate entity ceasing its formal existence. This is certainly true, *e.g.*, of "merger" or "consolidation" — terms that in the corporate reorganization context are understood as applying to the combination of two or more corporations in which one remains in existence while absorbing the others (merger), or a transaction in which the combining corporations all cease to exist and a new corporation emerges (consolidation).[5]

On the other hand, it seems clear that literal cessation of existence is not required in all cases. This is demonstrated by the example given in the legislative history cited by the Complainants (p. 14 *supra*), which posits the case of a contributing corporation S, which is 100% owned by P Corporation. The two comprise a controlled group which, according to the legislative history would be considered as the employer. If P then sells all of its interest in S to an unrelated party, "the controlled group would cease the exist," according to the example, but no withdrawal would be

---

5 See 19 *Am. Jur. 2d*, Corporations, §§ 2509, 2510; *Black's Law Dictionary* (6th Ed.).

considered to have taken place if S continues contributing to the plan.[6]

It is obvious that in this example, neither P nor S has literally ceased to exist, and the controlled group has done so only in the sense that its structure or composition has changed.[7]

Thus, the mere fact that none of the relevant corporate entities or controlled groups totally ceased to exist upon the formation of Safbank does not necessarily defeat the Complainants' reliance upon Section 4218(1) in the instant case.

In my view, however, the critical question here is really the third sub-issue addressed by the parties — whether the creation of Safbank and the transfer to it of the unincorporated liner operations of Bank Line and Safmarine constitutes a type of corporate change contemplated by Sections 4218(1) and 4069(b). For reasons discussed below, I conclude that it does not.

In the first place, the transaction at issue here does not really fit within any of the categories of corporate change

---

6 It is pertinent to note that even in the absence of Section 4218(1), changes in corporate structure that occur *within* a controlled group, or the relocation of covered activities within such group, will not result in a MPPAA withdrawal, since such events do not effect a change in "the employer" for withdrawal liability purposes. In addition to *Dyck v. Pacific Milling Co., supra*, where the court held that there was no withdrawal when covered operations were transferred from one corporate member of a controlled group to another, see PBGC Opinion Letter 85-29, *supra*.

7 It may be noted that this portion of the legislative history has clearly been recognized as providing an authoritative interpretation of the scope of Section 4218(1). *Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988); PBGC Opinion Letter 82-4 (Feb. 10, 1982).

identified in the pertinent statutory provisions. Indeed, the Complainants evidently recognize as much, since they argue only that the transaction "contains elements of a 'division,' a 'merger,' and a mere change of identity or form" (Brief at 27).

The reference in Section 4069(b) to an entity ceasing to exist by reason of "a mere change in identity, form or place or organization" is certainly not an apt description of what occurred here, since it involved the creation of an entirely new and separate corporate entity, without any of the original corporate entities changing its identity or form in any respect. It is also pertinent that since no one owns at least 80% of Safbank, this new corporation is not part of the controlled group of any of the original entities.

Nor can the transaction be said to represent a "merger" or "consolidation". As noted above, those terms have well-established meanings in the corporate reorganization context, and involve the combining of *corporate* entities — a process that did not take place here.

This leaves the term "division", upon which the Complainants have placed some reliance. This term does not appear to have an established meaning, analogous to those that exist for merger or consolidation, but I note that the PBGC has described as a "division" the distribution of the stock of a corporate subsidiary to the shareholders of the parent (PBGC Opinion Letter 85-29, Dec. 5, 1985). And presumably, in the legislative history example discussed earlier, the parent's sale of the stock of a wholly owned subsidiary to an outside entity was regarded as a "division" of the controlled group. See *Employee Benefits Law*, *supra*, at 774. In any event, it seems clear that a "division", as the term is used in Section 4069(b), cannot apply to the transfer, out of the controlled group, of an unincorporated

operation. Were the result otherwise, there would be little purpose to Section 4204 of the Act — the statutory "sale of assets" exception.

Indeed, it is the basic distinction that the statute draws between asset transactions and stock transactions that I believe is fatal to the Complainants' argument here.

Briefly stated, Section 4204 provides that if an employer sells its covered operations in an asset transaction, there is no withdrawal, provided certain conditions are met. Among these are that the sale be "bona fide, arm's length [and] to an unrelated party". Other conditions include the purchaser having an obligation to continue contributions to the plan, the purchaser providing to the plan a bond for five years in an amount equal to one year's worth of contributions, and a provision in the sales contract committing the seller to certain contingent secondary liability. In a transaction meeting the requisite conditions, the statute accords to the purchaser a limited portion of the seller's contribution history.

Given the explicit provision of Section 4204, it is well recognized that a disposition of covered operations through a transfer of assets can be effected without incurring withdrawal liability only if the transaction can be structured to meet the requirements of this Section. Section 4218(1), on the other hand, affords the means to convey covered operations, in corporate form, through the transfer of stock.

The critical distinction between the two forms of transfer has been highlighted in a series of opinion letters in which the PBGC has pointed out that where an employer wishes to dispose of covered operations which are lodged in an unincorporated division, it must do so in compliance with Section 4204 if it is to

avoid incurring a withdrawal. In the alternative, the PBGC has concluded, the employer may utilize Section 4218(1) by *first* incorporating the division, and then transferring the resulting subsidiary's stock to a transferee who will continue the contribution obligation.[8]

If — as the PBGC opinion letters plainly suggest — the transaction at issue here could have been accomplished in a manner consistent with Section 4218(1) if the respective liner divisions had first been separately incorporated and those corporations then transferred to form Safbank through merger or consolidation, the question arises whether it does not unduly elevate form over substance to deny Section 4218's application to a like result reached through different means. The answer, I believe, is that in this respect the statute itself makes attention to form an inescapable necessity.

This is particularly so since the Act attaches different requirements and different consequences to asset transfers under Section 4204 and stock transfers under Section 4218(1). In the case of the former, *e.g.*, the transaction must be at "arm's-length" and between "unrelated" parties. Moreover, the transferee, in addition to posting a bond, takes on the transferor's contribution history for the year of the transfer and the preceding four years, while the transferor retains some contingent secondary liability. In the case of a stock transfer, the parties may be related, no bond is required, the entire contribution history goes with the transferred corporation, and the former owners retain no contingent liability. These distinctions may be less than totally logical, but they are nonetheless unmistakable. The fact that the

---

8 See PBGC Opinion Letters 90-1 (Mar. 29, 1990), 85-15 (May 31, 1985), 84-7 (Dec. 20, 1984), 83-11 (May 16, 1983), and 82-4 (Feb. 10, 1982).

statute provides for them, I believe, leaves no room for parties to select one form of transaction while claiming the consequences of another, regardless of how reasonable the result may appear in any given instance.[9]

The authorities relied on by the Complainants do not conflict with anything stated here. For example, the legislative history cited by the Complainants and discussed above used a parent's sale of the stock of a corporate subsidiary as its example of how Section 4218(1) applies. Similarly, the Sixth Circuit ruled in *Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 857 F. 2d 1107 (6th Cir. 1988), that Section 4218(1) applied to a parent corporation's distribution of a corporate subsidiary's stock to the parent's shareholders — a distribution commonly referred to as a stock "spin-off".

---

9 Having provided a bond to the Fund, and having amended the joint venture agreement to provide for secondary liability in the event of Safbank's withdrawal, it is evident that an earlier stage the Complainants made an effort to qualify for exemption under Section 4204. Moreover, as previously noted, they claimed such exemption when seeking review by the Fund's Trustees. That claim was rejected by the Trustees on the ground that the transfer of assets from Bank Line and Safmarine to Safbank represented a capital contribution, rather than a sale, and thus could not qualify under Section 4204. In addition, the Trustees determined that since Bank Line, through its subsidiary Comeric, owned 55% of Safbank, Bank Line and Safbank could not be considered "unrelated" parties as required by Section 4204. (Section 4204(d) defines "unrelated party" with reference to Section 267(b) of the Internal Revenue Code; the effect of the two sections is to exclude from the definition corporations that are connected through greater than 50% stock ownership). The Complainants have not raised either of these determinations as issues in this arbitration, and I accordingly have no occasion to consider them here.

Appendix C

Also cited by the Complainants is *Park South Hotel Corp. v. New York Hotel Association Pension Fund*, 851 F. 2d 578 (2d Cir. 1988), cert. denied 488 U.S. 966, involving a partnership which had been contributing to a pension fund pursuant to a collective bargaining agreement covering employees of a hotel owned by the partnership. The case arose when the partners sold their respective interests to new partners — an event the fund claimed to be a withdrawal even though the partnership continued contributing to the fund. The Second Circuit ruled that it was the partnership as an entity — not the partners — that constituted the "employer"; that under New York law the partnership itself did not terminate since the new partners had evinced an intent to continue the partnership business; and, accordingly, that the transfers of the partnership interests did not effect a withdrawal from the fund.

The Second Circuit pointed out that the case was not governed by Section 4218(1), but cited that provision as evidencing a Congressional intent not to impose liability on ownership changes "that do not alter the employer's basic relation with, participation in, or obligation to, the plan or change the nature of the employer's operations" (851 F. 2d at 583). The court, of course, was addressing a situation where the contributing entity — either a partnership or a corporation — remained the same, with only its ownership altered. This is clearly not the situation in the present case. And while the court also indicated its view that imposition of withdrawal liability in circumstances where the fund has lost no contributions would not further the statutory purposes, I believe those comments must be considered in the particular context in which they were made. In other contexts the decisions have readily concluded that the absence of actual loss of contributions does not foreclose a fund from assessing liability against an employer who has incurred a

withdrawal under the statute's rigorous rules.[10] See, *e.g.*, *Central States Pension Fund v. Bellmont Trucking Co., Inc.*, 788 F. 2d 428, 432-33 (7th Cir. 1986), where the court rejected, as a defense to a withdrawal liability assessment, the employer's claim that the fund was not harmed by the withdrawal since its active employees were hired by other contributing employers. The court stated:

> [E]ven if we could be persuaded that the policy objectives of the MPPAA would not be served by imposing withdrawal liability in this case, we would have to reject the defendant's argument. Congress did not merely select a broad policy goal and instruct the courts to achieve that objective. Rather, Congress itself decided what rules, and exceptions to those rules, would best achieve its goals. The statutory language is the most reliable indicator of congressional intent . . . We have held that the 'enumeration of specific exclusions from the operation of a statute is an indicator that the statute should apply to all cases not specifically excluded' . . . Hence we are bound by the particular rules enacted by Congress and are not free to carve out our own exceptions merely because we believe they would not undermine Congress' goals.

---

10 Although the transfer of Bank Line's and Safmarine's covered operations to Safbank has not resulted in diminished contributions to the Fund, the Fund points out that it is nonetheless in a less protected position that it was prior to the transfer. Unlike the original contributing entities, which were each part of a large controlled group of businesses, Safbank is a corporation which owns little in the way of tangible assets, and is not part of any controlled group whose members would be jointly and severally liable to the Fund for its obligations.

Appendix C

Another decision relied on by the Complainants is *GFR Enterprises, Ltd. and National Shopmen Pension Fund*, 11 EBC 1040 (Sand, Arb. 1989), involving, in effect, the incorporation of a sole proprietorship, with all of the corporate stock being held by the same person who had owned the interest in the sole proprietorship. The arbitrator's conclusion that the sole proprietorship and corporation were the same employer since "[o]ne could not imagine a business change more clearly one of form alone" (14 EBC at 1047), is readily distinguishable given the facts of the present case.

Finally, the Complainants cite *Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson*, 830 F. 2d 1009 (9th Cir. 1987), a case where the two individual principals (the Mitchell brothers) in a joint venture were held subject to withdrawal liability. The Complainants argue, in effect, that if, as they believe was held in *Johnson*, individual joint venturers have sufficient identity with their joint venture as to be liable for the joint venture's withdrawal, such identity should preclude their being subject to withdrawal liability when they shift their own individual covered operations to such a joint venture.

In making this argument I believe the Complainants have misconceived what was at issue in *Johnson*. In that case neither the individual Mitchell brothers nor their unincorporated joint venture had been contributors to the pension plan. Rather, the contributing entity was a separate corporation, whose stock was also owned by the Mitchell brothers. When the corporation withdrew and defaulted on its liability, the pension plan pursued the joint venture, on the theory that it was a trade or business under common control with the withdrawing corporation, and consequently jointly and severally liable for the corporation's withdrawal. The plan also sought to hold the Mitchell brothers personally liable — a claim that the Ninth Circuit upheld on the

ground that just as partners are personally liable for the obligations of a partnership, so may the principals in a joint venture be liable for its obligations.

Under the circumstances, I don't believe the *Johnson* case offers any support for the Complainants contention that withdrawal liability should not be imposed on their transfer of covered operations to Safbank. Nor does it suggest that they would again be subject to withdrawal liability if Safbank should withdraw. Unlike the unincorporated joint venture in *Johnson*, Safbank was established as a corporation, and since it is not part of the controlled group of either of its two shareholders, there would seem to be no basis on which a future withdrawal by Safbank could result in joint and several liability to those shareholders.

Based on all of the foregoing considerations I conclude that Section 4218(1) does not apply to the discontinuance of covered operations by Bank Line and Safmarine and the transfer of such operations to Safbank, and accordingly, that the determination of the Trustees of the Fund should be upheld.

AWARD

The Fund's assessments of withdrawal liability against the Complainants are sustained. Pursuant to Rule 37 of the Multiemployer Pension Plan Arbitration Rules of the American Arbitration Association and 29 CFR § 2641.9, the arbitrator's fees and expenses and the administrative fees of the American

Appendix C

Arbitration Association shall be borne equally by the parties, and paid as directed by the Association. The parties shall bear their own costs and attorneys' fees in connection with this arbitration.

S/S _____
Robert E. Nagle
Arbitrator

April 27, 1992